INDEX

INDEX

CAPTION.

BE IT REMEMBERED, that at a session of the United States Court in and for the Northern District of Texas, held at Dallas, Texas, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

No. 6741 Civil.

JOHN W. ARNOLD,

versus

BEN KANOWSKI, INC.

PLAINTIFF'S ORIGINAL COMPLAINT.

Filed Sept. 25, 1956.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

John W. Arnold, Plaintiff,
vs. Civil Action No. 6741
Ben Kanowski, Inc., Defendant.

To the Honorable Judge of said Court:

Now comes John W. Arnold, hereinafter styled plaintiff, complaining of Ben Kanowski, Inc. (a corporation with principal place of business in the City and County of Dallas and State of Texas), hereinafter styled defend-

ant, and for cause of action your plaintiff respectfully shows unto the Court as follows:

I.

Your plaintiff is a resident citizen of the Northern District of Texas; the defendant is a Texas corporation whose principal place of business is at 5513 Maple Avenue in the City of Dallas, Dallas County, Texas, where service of process may be had upon its officers.

II.

This action is instituted and maintained under the provisions of Section 16(b) of the Fair Labor Standards Act (29 U.S.C., Sec. 216(b)), which creates the cause of action herein asserted by the plaintiff. Jurisdiction and venue are present in this honorable Court in that both parties to this proceeding are residents of the Northern District of Texas and all of the acts, facts, circumstances and transactions herein alleged occurred within the geographical limits of the Northern District of Texas.

III.

On or about October 17, 1954, the plaintiff entered into an oral contract of employment with the defendant, whereby the plaintiff was employed by the defendant in Dallas, Texas, at an hourly wage rate. The plaintiff commenced working in the employment of defendants on October 17, 1954, at an initial wage rate of eighty-five cents (85¢) per hour, and remained continuously in said employment until September 2, 1955, during which time he received increases in wage rate from time to time, and at various times during said period of em-

ployment his hourly wage rate was $0.85, $1.00, $1.25, $1.35, $1.50, $1.60 and $2.00, respectively.

IV.

Throughout the aforesaid period from October 17, 1954, through September 2, 1955, the capacity in which plaintiff was employed was that of machinist; the nature and character of his services and duties consisted of machine work in the production of phenolic aircraft parts, which were sold by the defendant in the course of its business as a supplier of phenolic aircraft parts. All of such services were performed at defendant's place of business in Dallas, Texas.

V.

All of the phenolic aircraft parts which plaintiff was engaged in producing were sold by defendant to various manufacturers of military aircraft for ultimate incorporation into military airplaines purchased by the United States Government. In some cases such products were shipped by defendant directly to the plant of an aircraft manufacturer outside the State of Texas. In other cases, the phenolic parts were shipped to an aircraft plant within Texas, where they were incorporated either (a) into a complete aircraft or (b) into an airframe component which was shipped by the Texas aircraft plaint to another plant outside Texas for assembly with other components into a complete aircraft. In all cases, the defendant produced and sold such aircraft parts under subcontracts from prime- or sub-contractors under contracts with the United States Government for production of military airplanes. The plaintiff was thus employed in the production of goods for interstate commerce

throughout the aforesaid period of employment by defendant.

VI.

During the entire period of his employment by the defendant, your plaintiff was employed and worked approximately sixty hours per week on the average. Although the defendant thus employed plaintiff for a workweek longer than forty hours, defendant wholly failed and refused to pay plaintiff compensation for his employment in excess of forty hours per week at a rate not less than one and one-half times the regular rate at which he was employed, as required by section 7(a) of the Fair Labor Standards Act (29 U.S.C. Sec. 207(a)). All compensation received by plaintiff for work in excess of forty hours per week was only at the regular hourly wage rate at which he was employed. Additional overtime pay in an amount equal to not less than one-half the regular rate of pay at which he was employed, for all hours of employment in excess of forty hours during each workweek, remains due and owing by defendants to plaintiff under the provisions of said Act.

VII.

The plaintiff did not maintain a detailed record of the number of hours of employment during each workweek, but the defendant was required by law to keep and maintain an accurate and detailed record of the hours worked by plaintiff each week and other wage information. Therefore, the exact amount of wage underpayment due to plaintiff by the defendant is not known by plaintiff but is well known to defendant. Plaintiff is informed and believes, and therefore alleges, that the amount of

wages due but withheld from him by defendant is more than six hundred dollars ($600.00).

VIII.

Although the plaintiff has often demanded payment and restitution by defendant of the unpaid wages due him as aforesaid, the defendant has wholly failed and refused to make payment and restitution of the wages rightfully due plaintiff or any part thereof, and defendant still so fails and refuses to comply with the Federal law, even after being advised by the Wage and Hour Division of the United States Department of Labor as to the amount of wage underpayments determined to be due this plaintiff as a result of an investigation by said agency of the Federal Government. As a result of such arbitrary, oppressive and malicious withholding by defendant of the wages rightfully due to plaintiff, your plaintiff has been left in dire and distressing circumstances and has suffered greatly; the plaintiff, therefore, prays that he be awarded an additional amount equal to the amount of wage underpayments, as liquidated damages provided by law for the retention by defendant of his rightful wages.

IX.

As a result of the arbitrary and oppressive refusal of defendant to make payment and restitution of the wages lawfully due to plaintiff, your plaintiff has been compelled to employ attorneys to represent him, and the defendant having further refused to negotiate in good faith with said attorneys, to file this suit to enforce his lawful rights, and the plaintiff has necessarily agreed to pay said attorneys a reasonable fee for their

services rendered in this behalf, which would be the sum of $1,000.00.

Wherefore, premises considered, your plaintiff prays that the defendant be cited in terms of the law to appear herein; that upon final hearing hereof, plaintiff have judgment of and from said defendant in the sum of six hundred dollars ($600.00) lawful wages withheld by defendant (or such greater amount as may be found actually due), plus an additional equal amount as liquidated damages provided by statute, plus a reasonable attorney's fee of one thousand dollars ($1,000.00), plus interest and all costs of Court; and the plaintiff have all such other and further relief, general and special, at law and in equity, to which he may show himself justly entitled.

JOHN W. ARNOLD,
(John W. Arnold).
JOE H. McCRACKEN, III,
Of Carrington, Gowan, Johnson, Bromberg & Leeds,
Attorneys for Plaintiff.

DEFENDANT'S ANSWER.

Filed Oct. 12, 1956.

(Title Omitted.)

To the Honorable Judge of said Court:

Now Comes Ben Kanowsky, Inc., a Texas corporation, and files this its original answer to plaintiff's original complaint and for same would show unto the Court as follows:

1.

Defendant admits residence as alleged in paragraph No. 1 of plaintiff's original complaint.

2.

Defendant admits that this action is instituted under the Fair Labor Standards Act of 1938 as Amended but expressly denies that the plaintiff has complied with the provisions of said Act so as to enable plaintiff to bring an action under the said Act in this honorable Court. All other matters in paragraph No. 2 are expressly denied.

3.

Defendant admits that he did orally employ the plaintiff on or about the 17th day of October, 1954 but is unable to set forth the express wage increases which the plaintiff received at this time. All other matters in paragraph No. 3 are expressly denied.

4.

Defendant expressly denies all of the allegations in paragraphs No. 4, 5, 6, 7, 8 and 9 of plaintiff's original complaint.

5.

For further answer, herein, defendant would show that the majority of its business is to conduct a business of upholstering, repairing furniture and interior decorating. That being in this type of business and having woodworking machines, your defendant has, incidental to its principal business as above set forth, done from time to time certain phenolic and woodwork for aircraft plants in Dallas County, Texas. That the principal business of your defendant being as aforesaid, this defendant is not engaging in Interstate Commerce so as to bring your defendant within the coverage of the Fair Labor Standards Act of 1938 as amended.

6.

In the alternative, should the Court find that defendant's business does fall within the coverage of the Fair Labor Standards Act, then your defendant would show that its business is such as to come within the exemptions of said Act as a service establishment.

7.

Defendant would show that it employed the plaintiff as a handicapped worker. That specifically, the plaintiff has a plate in his hip or leg, was allegedly an alcoholic, and thus is not able to preform all types of

work. Your defendant would show that under these circumstances it employed the plaintiff as a handicapped and disabled worker and on the basis of an agreement that he would be paid eighty-five cents (85¢) per hour for the hours that he worked. The defendant told the plaintiff that the company was working forty hours per week and more if the plaintiff wished to work more, but that the plaintiff would not be required but to work forty (40) hours per week. The plaintiff, being unemployed and being in the condition above described, and being unable to secure work, accepted this employment on the above terms as a handicapped and disabled worker. Your defendant would show that it had no knowledge of the necessity of securing a certificate from the Fair Labor Standards Administrator until after the plaintiff was no longer employed by it.

8.

Defendant would show that the plaintiff, being in the condition above described, was employed just as a general helper or workman about the premises and was at no time employed as a machinist as plaintiff has alleged. Defendant would show that the plaintiff helped in upholstery work, helped in furniture repairs, helped in interior decorating work, helped in the assorting of fabrics, woods and other materials stored in defendant's supply storage, helped in clean-up work and in many other matters of this nature besides doing some phenolic work. Defendant would show that a large percentage of the overtime work which plaintiff did, if any, was on matters and work of your defendant's business which did not in any way involve or could be in any way associated with work which could come within the meaning of the Interstate Commerce coverage of the Fair

Labor Standards Act and in fact, defendant states that none of his said work came within the coverage of the Fair Labor Standards Act as Interstate Commerce is therein used.

Wherefore, Premises Considered, defendant prays that plaintiff take nothing by his suit and that your defendant recover his costs of Court and go hence without day and for such other and further relief, either in law or in equity, as to which your defendant may be entitled and for which he shall forever pray.

JOHANNES AND KELSOE,
By G. H. KELSOE,
Attorneys for Defendant.

2530 Fairmont RA-2227,
Dallas, Texas.

JUDGMENT.

Filed Jan. 25, 1957.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

John W. Arnold, Plaintiff,
vs. Civil Action No. 6741
Ben Kanowski, Inc., Defendant.

On the 17th day of January, 1957, at a regular term of this Court, came on for trial the above entitled and numbered cause; and both the plaintiff and the defendant appeared in person and also by and through their attorneys of record and announced ready for trial. Both

the plaintiff and the defendant introduced evidence and made argument to the Court, and it appearing to the Court from a consideration of the pleadings, of the evidence, and of argument of counsel that the plaintiff is entitled to have judgment:

It Is Therefore Ordered, Adjudged, And Decreed on this the 17 day of January, 1957, that the plaintiff, John W. Arnold, do have of any take from the defendant, Ben Kanowski, Inc., of and for his damages the sum of Three Hundred Ninety-six and No 100 Dollars ($396.00), together with reasonable attorney's fees in the amount of Two Hundred Fifty Dollars ($250.00), together with Six Per Cent (6%) interest thereon from this date until paid, for all of which let execution issue. Also for costs.

To the foregoing decision, the defendant in open Court made exception and gave notice of appeal.

(S.) WM. H. ATWELL,
The Honorable W. H. Atwell, Judge United States District Court for the Northern District of Texas, Dallas Division.

Approved:

.....
Attorney for Plaintiff.

.....
Attorney for Defendant.

NOTICE OF APPEAL.

Filed Feb. 15, 1957.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

John W. Arnold,

vs. No. 6741

Ben Kanowsky, Inc.

Notice is hereby given that Ben Kanowsky, Inc., defendant in the above entitled and numbered cause, hereby appeals to the Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of January, 1957, in favor of the plaintiff, John W. Arnold, and against the defendant, Ben Kanowsky, Inc., wherein plaintiff was allowed a recovery of $396.00, plus reasonable attorney's fees in the sum of $250.00, interest and costs of Court.

Dated this 13th day of February, 1957.

JOHANNES AND KELSOE

By G. H. KELSOE.

Attorneys for Appellant. RI 2-2227.

2530 Fairmont,
Dallas, Texas

SUPERSEDEAS BOND.

Filed Feb. 15, 1957.

(Title Omitted.)

Know all Men by these Presents:

That the American Automobile Ins. Company, a corporation created, organized and existing under and by virtue of the laws of the State of Missouri, having its principal place of business in the City of Dallas State of Texas, and duly authorized to carry on a general casualty insurance business within the State of Texas, and in the Courts of the United States, is held and firmly bound unto John W. Arnold, plaintiff, in the full and just sum of Fifteen Hundred ($1500.00) Dollars, to be paid to the said John W. Arnold, its administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 15th day of February, 1957.

Whereas, on the 17th day of January, 1957, in an action pending in the United States District Court for the Northern District of Texas between John W. Arnold, plaintiff, and Ben Kanowsky, Inc., a corporation, as defendant, Civil Action No. 6471, final judgment was rendered in favor of the said plaintiff, John W. Arnold, and against Ben Kanowsky, Inc., a corporation, as defendant, for $396.00 plus $250.00 as reasonable attorneys fees, and the said defendant, Ben Kanowsky, Inc., having filed its notice of appeal from such judgment to the United States Court of Appeals for the Fifth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said Ben Kanowsky, Inc., a corporation, shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void otherwise to remain in full force and effect

BEN KANOWSKY, INC.

(S.) By BEN KANOWSKY,
(Ben Kanowsky),
President.

AMERICAN AUTOMOBILE
INS. COMPANY

(S.) By CARL E. RADCLIFF,
(Seal) Attorney in Fact.

Approved: 15 day of February, 1957.

(S.) WM. H. ATWELL,
United States District Judge.

February 25, 1957

United States District Clerk,
Federal Building,
Dallas, Texas.

Re: John Arnold vs. Ben Kanowsky.

Civil Action No. 6741.

Letter of Designation filed Feb. 27, 1957.

Dear Sir:

I would like to designate the following instruments to be prepared in a transcript for the appealing of this cause to the Fifth Circuit Court of Appeals, to wit:

Plaintiff's original petition.

Defendant's original answer.

Judgment—Notice of Appeal.

Supersedeas Bond.

Sincerely yours,
JOHANNES AND KELSOE,
By (S.) G. H. KELSOE, Jr.
(G. H. Kelsoe, Jr.)

GHK:ms

cc: Mr. Joe H. McCracken, III,
Carrington, Gowan, Johnson, Bromberg & Leeds,
Mercantile Bank Bldg.,
Dallas, Texas.

PROCEEDINGS.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

John W. Arnold,
vs. No. 6741-Civil
Ben Kanowski, Inc.

Be It Remembered that on the 17th day of January, 1957, before the Honorable William H. Atwell, United States District Judge, the following proceedings were had in the above styled and numbered cause:

Appearances:
Carrington, Gowan, Johnson, Bromberg & Leeds, Dallas, Texas, By Mr. Joe H. McCracken, III, For the plaintiff;

Johannes & Kelsoe, Dallas, Texas, By Mr. G. H. Kelsoe, Jr., For the defendant.

The Court:
Are there formal orders desired by members of the Bar before proceeding with the call? If not, you can call the matters set for today.

The Clerk:
Cause number 6741, John W. Arnold versus Ben Kanowski, Inc. Carrington, Gowan, Johnson, Bromberg & Leeds for the plaintiff; Johannes & Kelsoe for the defendant.

The Court:
What says the plaintiff?

Mr. McCracken:
Plaintiff is ready, if the Court please.

The Court:
What says the defendant?

Mr. Kelsoe:
Defendant is ready, Your Honor.

The Court:
I believe that is the only matter that we have set today. Do you have some witnesses you wish sworn, gentlemen?

Mr. Kelsoe:
Yes, Your Honor.

Mr. McCracken:
Yes, sir.

The Marshall:
The witnesses come around here inside of the bar and be sworn.

The Clerk:
The witnesses will hold up their right hands.

(Witnesses sworn.)

The Court:
Mr. Arnold may stay in, and who else will you have? Anyone for the plaintiff?

Mr. Kelsoe:
I would like to have Mr. Kanowski for the defendant, Your Honor.

The Court:
I say for the plaintiff that is the only one?

Mr. McCracken:
No, sir, just Mr. Arnold.

The Court:
And who did you want for the defendant?

Mr. Kelsoe:
Mr. Kanowski, if Your Honor please.

The Court:
The rest of you step outside, and while you are out there, don't talk among yourselves about what your testimony has been nor what it will be. If either of the attorneys wish to speak with you, you may do that, of course, but do that only in the presence of an officer of the Court. Hold yourselves out there in readiness ready to come in when the Marshal calls you.

The Marshal:
All right. Have a seat out there, and unless your name has been called to stay in.

The Court:
Plaintiff care to make a statement?

Mr. McCracken:
Yes. If the Court please, this case is brought by my client, Mr. John Arnold, under Section 216 of Title 29 of the Code for—to recover overtime compensation which has not been paid to him in violation of Section 207 of Title 29 of the Code. Mr. Arnold was employed by the defendant corporation between the dates of October of

1954 and September of 1955. We intend and expect to prove that Mr. Arnold was engaged in the production of goods for commerce, and that these goods were sold either out of state or to other manufacturers within the state, and being employed into aircraft which were shipped into interstate commerce, Mr. Arnold's duties being the manufacturing of phenolic aircraft parts, which are ultimately incorporated into the finished airplane.

We next intend to prove, if the Court please, that Mr. Arnold for many, many weeks worked, with rare exception, a total number of hours in excess of forty, and that he was paid straight rate at a rate in excess of the minimum required by the Statute; but that Mr. Arnold was not paid his overtime which was due an employee engaged in the type of activity in which he was engaged, all to his loss, we except to prove, in the amount of $396. That is all I have to say, unless the Court has a question.

The Court:

Any statement for the defendant?

Mr. Kelsoe:

If Your Honor please, it is the position in this cause that the defendant is an interior decorator and a custom upholstery and furniture firm; that such work that he does in that line is the majority of his work, and because of the nature of the work being seasonal, he has taken on the performance of incidental contracts which are incidental to his main business of interior decorating and upholstery; that he has done this in order to keep his men employed all year round; that the plaintiff in this cause worked on a number of jobs other than the making of the aircraft parts, and that these other jobs on which he worked on had nothing whatsoever to do,

within even the fondest imagination, with interstate commerce, and further we are within an exception provided by the Statute as a retail service establishment. Thank you, Your Honor.

The Court:

All right. Call your first witness gentlemen.

Mr. McCracken:

If the Court please, under the Rule regarding adverse witnesses, the plaintiff would first like to call Mrs. Ben Kanowski and the records which have been subpoenaed to be brought here by her.

MRS. BEN KANOWSKI, being first duly sworn, testified on her oath as follows:

Direct Examination.

By Mr. McCracken:

Q. Ma'am, would you state your name, please, to the Court.

A. Mrs. Ben Kanowski.

Q. I see. Are you associated in any way with the defendant Ben Kanowski, Inc., ma'am?

A. I am.

Q. In what capacity, ma'am, will you tell the Court, please?

A. I am secretary and treasurer of the corporation.

Q. Did you receive a subpoena, ma'am, requesting that you bring your wage, hour and rate books regarding the employees in your employ in October of '54 to September of '55?

A. I received a subpoena to bring the payroll records.

Q. Yes, ma'am. Did you bring those records?

A. I did.

Mr. McCracken:

Mr. Reporter, may I have these identified as plaintiff's Exhibits.

(The instruments referred to were here marked Plaintiff's Exhibits Nos. 1 and 2 for identification.)

(By Mr. McCracken):

Q. Would you tell the Court, please, ma'am, in your words what these records are and what they concern regarding the employ of the plaintiff in this case, Mr. John Arnold?

A. What these records are?

Q. Yes, ma'am.

A. They are posted daily from the employees' time tickets, on the daily tickets.

The Court:

Speak out a little louder, madam.

A. On the daily tickets, the employees post the number of hours worked. From those, I post to this book and make the payroll.

The Court:

All right.

(By Mr. McCracken):

Q. Now, ma'am, would you tell the Court if there is a sheet there reflecting the total hours worked in each

week between the dates of October of '54 and September of '55?

A. That is shown on each weekly sheet.

Q. I see, ma'am. For example, ma'am, if I may, would you read to the Court the work week beginning on October 17 regarding the plaintiff, Mr. John Arnold.

A. He worked five days of 11½, 11½, 9½, 11½, 9½, and on Saturday morning of 4 hours for a total of 57½ hours.

Q. Ma'am, what rate of compensation was the plaintiff paid for that work, ma'am?

A. Mr. Arnold started at 85c an hour—

Q. I see.

A. —when he started.

Q. Ma'am, would you tell the Court what the total wages paid were for that week?

A. Forty-eight eighty-eight.

Q. Forty-eight eighty-eight. Does that reflect a payment of overtime, ma'am, or was that just the straight rate?

A. That is the straight rate.

Q. There is no overtime that has been paid for that week, for example?

A. No.

Q. All right. Now, ma'am, if we were to continue on with each week up to September of 1955, was there any overtime payment made during that time whatsoever to Mr. John Arnold, the plaintiff in this case?

A. He was paid a straight rate.

Q. Paid a straight rate. But was not paid any overtime?

A. No.

Q. Ma'am, may I ask whether or not you have totaled the overtime that might be due him?

A. I don't know any overtime that might be due him.

Q. Well, if it were, have you made any attempt to determine how much it might be if it were?

A. No, I haven't.

Q. All right. Thank you ma'am.

The Court:

Do you wish to cross examine, now?

Mr. McCracken:

If the Court please, could I offer these for the plaintiff's Exhibits 1 and 2?

The Court:

Well, that is what you have been doing.

Mr. McCracken:

Yes, sir.

The Court:

All right.

Cross Examination.

By Mr. Kelsoe:

Q. Mrs. Kanowski, the records which have been offered into evidence here show only the hours worked, is that correct?

A. That is correct.

Q. Do they show the particular jobs upon which the plaintiff worked during that period of time?

A. They do not.

Q. Mrs. Kanowski, do you know of your own knowledge whether or not the plaintiff worked on jobs such as building cabinets or furniture or tables or things of that nature that went here in Dallas, Texas?

A. There were several jobs that he worked on in building furniture. I can name one job in particular.

Q. Will you do that, please?

A. I will. That was the Investment Management job at 1201 Main Street.

Q. Here in the City of Dallas?

A. That is right.

Q. What was done in that job, Mrs. Kanowski?

A. We built custom furniture for several offices; we made paneling that went up in the offices.

Q. I see. Is that part of the interior decorating work that you all do?

A. That is right.

Q. Did you have occasion to go back in the shop on a number of occasions during the time that John Arnold was employed there?

A. I was in the shop several times a day.

Q. During the time that you were in the shop; did you have occasion to see him working on furniture jobs?

A. Yes, sir. There were occasions when everybody in the cabinet shop was working on furniture.

Q. Were there times for weeks at a time when he would work on these furniture jobs and not do any aircraft jobs at all?

A. There were possibly a week, over a week at a time, where the shop would be tied up on this one job I was talking about, the paneling; the machines were tied up on that job.

Q. And there was no aircraft work done during that period?

A. I don't think so.

Q. Well, to the best of your knowledge, was there any done during that period?

A. No.

Mr. Kelsoe:
I believe that is all.

The Court:
All right. Call your next witness, gentlemen.

Mr. McCracken:
The plaintiff would call the party plaintiff, Mr. John W. Arnold.

JOHN W. ARNOLD, being first duly sworn, testified on his oath as follows:

Direct Examination.

By Mr. McCracken:

Q. Sir, would you state your name to the Court, please?

A. John W. Arnold.

Q. And have you been in the employ of the defendant, Ben Kanowski, Inc., sir?

A. Yes, sir, I have.

Q. Between what dates, sir?

A. October, 1954 to the first part of September, 1955.

Q. I see, sir. In what capacity, Mr. Arnold, were you employed?

A. I was hired as a phenolic worker.

Q. And who were you hired by, sir?

A. I was hired by Howard Crenshaw under Mr. Ben Kanowski.

Q. I see. In what capacity did Mr. Crenshaw serve?

A. He was shop foreman.

Q. I see, sir. Now, tell the Court exactly what your first duties were when you were first hired in October of '54.

A. The first day I went to work, I went to work in the afternoon.

Q. I see, sir.

A. I am pretty sure it was in the afternoon. I worked —went to work on a lathe; the first day, I went to work turning out phenolic parts.

Q. Will you tell the Court what phenolic parts are?

A. It is a thermo-setting plastic used for blocks, bumpers, fair leads, cable guides, pulleys.

Q. I see.

A. It is used extensively in the aircraft industry, and in automobile timing gears.

Q. Did you make these parts from a particular pattern or a particular jig, we might say, or model?

A. We made them from a blue print. You make your own jigs from the blue print.

Q. Who do they come from?

A. From the prime contractor, the manufacturer of the aircraft that they went into.

Q. Did you see any of those blue prints?

A. One for every job that I done.

Q. Would you tell the Court where some of those blue prints came from?

A. Some from Lockheed, some from Chance Vought; I never seen a Temco; I have seen them since; but Temco usually supplied another contractor's print.

Q. I see sir. Now, would you tell the Court how much of your time was spent in the production of what you have called phenolic aircraft parts?

A. I would say between ninety-five and ninety-eight percent of the time I was there.

Q. Nearly all of the time?

A. Practically all of the time.

Q. Now, sir, with those exceptions in mind, what were you doing during all of the other period?

A. As Mrs. Kanowski said, I worked a few days on that Investment Management job.

Q. I see.

A. And from time to time, I would shut down maybe for an hour and help somebody, if they had something maybe too heavy for them to handle.

Q. I see, sir. But generally, almost one hundred percent of your time was spent in machining and producing these parts?

A. That is right.

Q. Made on lathes and saws and so forth?

A. Yes, sir.

Q. I see. Now, Mr. Arnold, I will hand you what has been marked plaintiff's Exhibit 1 and ask you if you have ever seen that, sir?

A. No, sir.

Q. I see, sir. Of course, you are familiar with the wages and the hours that you worked—

A. Yes, sir.

Q. —during that period of time? At any time while you were in the employ of the defendant, were you ever paid any overtime?

A. No, sir. I was paid at a straight rate for all hours worked.

Q. All right, sir. I will hand you plaintiff's Exhibit No. 1, Mr. Arnold, and ask you to read to the Court what this payroll summary for October 25th of 1954 states in total hours worked?

A. Sixty-six and on-half.

Q. And is there an indication, sir, of the rate that was paid you at that time?

A. I don't see it; but it is probably there.

Q. Was it about a dollar an hour?

Mr. Kelsoe:

We are going to object to conjecture or guessing, if Your Honor please.

Mr. McCracken:

If the Court please, it is their own record.

The Court:

That doesn't make any difference. You don't guess at a record.

Mr. McCracken:

He is just trying to find it.

The Court:

Well, let him find it.

Mr. McCracken:

All right, sir.

A. I see no hourly rate on it. I see a weekly rate.

By Mr. McCracken:

Q. All right. What was paid for that?

A. Net cash wages paid was $60.06.

Q. I see, sir. What were the total wages paid?

A. $66.50.

Q. I see, sir. All right, sir. I will hand you a work week beginning November 1, of plaintiff's Exhibit No. 1, and ask you if—to read to the Court your total hours worked that week, sir?

A. Sixty-one and one-half.

Q. All right, sir. What were the total wages paid at that time, sir?

A. Sixty-one fifty.

Q. And do you have an indication of the hourly rate?

A. One dollar.

Q. I see, sir. Now, that does not reflect the payment of overtime, is that true, sir?

A. Yes, sir.

Q. Mr. Arnold, I will ask you to figure for the Court if you know how to figure overtime, sir, within your own knowledge?

A. Yes, sir.

Q. You'd know how. Would you take this pencil and paper with and figure from your sixty-one and one-half hours what your overtime rate would be if you were entitled to any overtime?

A. I figure seventy-two twenty-five.

Q. All right, sir. That would be an additional $10.75, is that correct, sir?

A. Yes, sir.

Mr. McCracken:

Your Honor, in the interest of time we have examined the records and have taken the total hours and figured the overtime rate to arrive at what the possible overtime value would be which we would like to submit to the Court.

The Court:

Well, the Court don't—

Mr. McCracken:

I believe at this time, Your Honor, that is what I have.

The Court:

Well. What is it?

Mr. McCracken:

It is a week by week account, sir, of the hours worked by the plaintiff and the straight rate paid him with figures as to his overtime hours figured at half of his rate.

The Court:

Ask the attorney on the other side and maybe you can agree on it.

Mr. McCracken:

All right, sir.

Mr. Kelsoe:

If Your Honor please, I am not familiar with those figures which counsel has shown me. I don't want to unduly burden the Court; but on the other hand, I do not feel that I can agree to recognize figures which I know nothing about, if Your Honor please.

The Court:

Well, he has told you that he sues here for $396 for overtime.

Mr. Kelsoe:

Yes, Your Honor.

The Court:

You don't question that, do you?

Mr. Kelsoe:

I don't question the nature of the suit, no, Your Honor. There will develop, if Your Honor please, possibly some credits on those hours which he wrongfully claimed that I am going to develop on cross examination. Other than that, I do not question it, if Your Honor please.

The Court:
All right.

Mr. McCracken:
Well, Your Honor, I do not believe the exception would have any bearing on this, sir. This is simply a figuring of their own books, sir.

The Court:
All right. Go ahead.

Mr. McCracken:
All right, sir.

The Court:
That is—

Mr. McCracken:
8396.

The Court:
—three hundred and ninety-six.

Mr. McCracken:
I will offer this as plaintiff's Exhibit No. 3.

(The instrument referred to was here marked plaintiff's Exhibit No. 3 for identification.)

The Court:
Anything else?

Mr. McCracken:
That is all, sir.

The Court:
Any cross, gentlemen?

Cross Examination.

By Mr. Kelsoe:
Q. Mr. Arnold, I am going to hand you here a group of papers and ask you if you can tell me what those are?
A. Yes, sir. They are daily time tickets handed out once a week, Mr. Kanowski's.
Q. Those are the time tickets that you put your time down on each day, is that right?
A. Yes, sir.

Mr. Kelsoe:
I will ask the Reporter to mark these as defendant's Exhibit No. 1.

(The instruments referred to were here marked defendant's Exhibit No. 1 for identification.)

The Court:
Do those cover the period from October of '54 to September of '55?

Mr. Kelsoe:
It is during that period, Your Honor. I didn't offer all of them. I just want to show—

The Court:
Oh, yes. Well, all right. All right. Let's go on.

Mr. McCracken:
I have no objection.

Mr. Kelsoe:

We offer these into evidence.

(By Mr. Kelsoe):

Q. Mr. Arnold, did you eat lunch out there every day?

A. No, sir.

Q. You didn't eat lunch?

A. Not at the shop.

Q. Did you take time off out there for lunch every day?

A. Yes, sir, half an hour.

Q. Half an hour. Do these tickets here marked defendant's Exhibit 1 show a place to put down the time that you took off for lunch?

A. It shows a place; but I don't think I ever used it.

Q. I will ask you to look at those and will ask you to tell the Court if every employee didn't put down the time that they took off for lunch except you?

A. I don't know.

Q. Well, look at it.

A. I am looking at it right now.

Q. Jim has thirty minutes for lunch, doesn't he?

A. That is right.

Q. Wig has a half hour for lunch, doesn't he?

A. These tickets here has them; but that doesn't there, that for Gabe.

Q. Look at the rest of them and see if they don't have them.

A. These all have them; but I never saw one made out with it on it.

Q. They are all on there, aren't they?

A. Because if you didn't get back from your lunch hour in a half hour, that was all.

Q. Look at those and tell me if a lot of those don't have the jobs that the person worked on each day on them.

The Court:

I don't see the relevancy of this matter. You are talking about other employees, now?

Mr. Kelsoe:

Yes, sir, except him, and he never listed any of the jobs that he worked on.

A. May I answer that?

(By Mr. Kelsoe):

Q. Did you ever list any of the jobs that you worked on?

A. Yes, sir, I did.

Q. Where are they?

A. Whatever jobs that I worked on besides phenolic were listed; those are for the records.

Q. Are there any jobs on there?

A. I didn't list any; because I didn't work any except phenolic.

Q. Who is Mr. Crenshaw?

A. My present employee.

The Court:

Employee?

The Witness:

Employer. I am sorry, sir.

(By Mr. Kelsoe):

Q. What relationship is he to you?

A. He married my sister.

Q. He is your brother-in-law?

A. Yes, sir.

Q. He was the man that was responsible for getting you the job for Mr. Kanowski.

A. He was the man that asked me to go to work for such small wages, told me he was in a tight and needed some help.

Q. Isn't it a fact that you have a plate in your leg and are disabled?

A. No, sir. I am not disabled. I have an Austin Moore prosthesis.

Q. Don't you draw a pension from the government?

A. No, sir. I draw compensation.

Q. And when you were hired by Mr. Kanowski, you were hired as a disabled worker?

A. No, sir, not to my knowledge, it was never broached to me. I have never put myself off as a disabled person.

Q. Mr. Arnold, do you drink?

A. Yes, sir, I drink.

Mr. McCracken:

Your Honor, we object to that. Whether the man has an occasional drink has nothing to do with this lawsuit.

The Court:

Overrule the objection.

(By Mr. Kelsoe):

Q. Did you drink on the job out there?

A. No, sir.

Q. You are positive of that?

A. I am positive of that.

Q. Isn't it a fact that when Mr. Kanowski hired you, he hired you with the knowledge that you had a reputation of being an alcoholic?

A. Not to my knowledge, because I didn't have the reputation of being an alcoholic.

Q. Didn't you work on jobs out there, other than these aircraft parts?

A. I have stated already to the Court I worked a few minutes or a few hours, and I worked for several days on Investments Management.

Q. Didn't you work for several days on the General Foods job?

A. I may have; but I have never heard of the General Foods job.

Q. You don't know the name of the job; but you could have done something on it?

A. I could have picked up a board or helped them lift something; but that is as far as it went.

Q. Isn't it a fact that when you glued up their furniture out there, you had to help them hold the parts in their glueing up operation?

A. I may have glued five parts out there, maybe thirty minutes apiece.

Q. Did you work on the Lamar Life Insurance [illegible]

A. Not to my knowledge.

Q. Do you deny helping work on it?

A. I don't deny helping maybe a minute on any of those jobs; but I didn't work on them.

Q. As a matter of fact, you don't know how much time you spent on those jobs?

A. I have an idea how much time I spent on them other than phenolic.

Q. Didn't you allege that the defendant didn't keep an exact record of it, and the exact hours are unknown to you?

A. That is right.

Q. And that is the truth of the matter, isn't it?

A. That is right.

Mr. Kelsoe:
That is all.

The Court:
All right. Call your next witness.

Mr. McCracken:
We would call Mr. Crenshaw, if the Court please.

HOWARD CRENSHAW, being first duly sworn, testified on his oath as follows:

Direct Examination.

By Mr. McCracken:
Q. Sir, would you state your name to the Court, please?
A. Howard Crenshaw.
Q. And what is your occupation now, sir?
A. At the present time, I am self-employed; I have a small business of my own.
Q. I see. And what do you make in that business, sir?
A. I make custom cabinet work and aircraft parts.
Q. I see, sir. Have you had an occasion, sir, to have been in the employ of the defendant, Ben Kanowski, Inc.?
A. Yes, sir.
Q. You have. Were you so employed, sir, between the dates of October of '54 and September of 1955?
A. That is about right; I am sure that is right.
Q. All right, sir. In what capacity were you so employed, sir?
A. I was shop foreman.

Q. Shop foreman. And would you tell the Court briefly what your duties were, sir?

A. Well, I was given work orders out of the office, and it was my duty to see that they were properly done through the shop and to assign men as to what operations on the jobs to do.

Q. I see, sir. Did you have any personal contact with the plaintiff in this case, Mr. John Arnold?

A. Yes, sir.

Q. And how did that relationship come about, sir?

A. He was hired as an employee to work under my supervision.

Q. And for what purposes was he hired, sir?

A. He was hired as the helper in the shop working on different machinery and so forth.

Q. And during the time that he was under your supervision, what did Mr. Arnold do with these machines that you said he was working with?

A. Oh, he made aircraft parts.

Q. I see, sir. What kind of aircraft parts?

A. Wood and phenolic.

Q. Wood and phenolic. On what type of machines did he make these phenolic parts?

A. Drill presses and band saws.

The Court:

Speak out so I can hear you.

A. Drill presses, band saws, lathes, jigsaws, grinders.

(By Mr. McCracken):

Q. All right, sir. Would you tell us, please, to the best of your memory, you had Mr. Arnold under your supervision for, we will say, almost a year, is that about right, sir?

A. Yes, sir.

Q. Would you tell the Court to the best of your recollection approximately how much of the time that Mr. Arnold was working on the job, approximately how much of the time spent there was engaged in the production of these parts that you called aircraft parts, sir?

A. I would say ninety-eight percent of his time was engaged in aircraft parts.

Q. Almost entirely?

A. Yes, sir.

Q. Well, sir, if almost all of this time was spent there, that would lead us to think that there may have been some time that he was not engaged in it, and what was he doing at those times, sir?

A. The only time that he wasn't engaged in making aircraft parts was when he was standing close to someone to help someone who was doing something else. He actually was assigned to doing aircraft parts alone, period.

Mr. McCracken:

Just a moment. I would like to ask my client a question.

(By Mr. McCracken):

Q. Mr. Crenshaw, are you familiar with any type of hip injury or difficulty that Mr. Arnold has?

A. Yes, sir.

Q. Does it incapacitate him?

A. No, sir. He draws full time pay as a mechanic.

Q. Have you ever known Mr Arnold to have taken a drink on the job out there?

A. No, sir.

Q All right, sir.

Mr. McCracken
That is all

The Court
Any cross, gentlemen?

Mr. Kelsoe
Yes, Your Honor

Cross Examination

By Mr. Kelsoe

Q. Mr. Crenshaw, you are the brother-in-law of Mr. Arnold, aren't you?

A. Yes, sir

Q. And you were the foreman out at Ben Kanowski and you asked Mr. Kanowski to hire him?

A. No, sir

Q. You didn't do that?

A. No, sir, I didn't ask him to. I told him he was available

Q. Told him he was available?

A. Yes, sir.

Q. Tell the Court what else you told him or suggested to Mr. Arnold.

A. I didn't tell him anything else that I know of. I told him, "I haven't seen him for ten or twelve years and I don't know whether he can do the job or not." I said, "am sure he will appreciate a job, because he has been in the hospital and has been looking for a job."

Q. You told him he was disabled?

A. No, sir, didn't tell him he was disabled

Q. You also told him that the boy had a reputation of being an alcoholic?

A. No, sir

Q You didn't tell him that?

A No, sir. hadn't saw the boy in eleven years.

Q Isn't it a fact that you have quit Mr. Kanowski, opened up your own shop, taken John Arnold with you, and you all are going out and calling on Mr. Kanowski's customers now and trying to get his business?

Mr. McCracken:

We object to that, Your Honor. That hasn't got anything to do with it, whether they did or didn't makes no difference.

The Court:

Answer the question.

A I opened my own shop. Mr. Arnold stayed with Mr. Kanowski. Later on, he quit and went to work for me.

The Court:

All right.

By Mr. Kelsoe:

Q Now, isn't it a fact that Mr. Arnold worked on a number of other jobs other than making aircraft parts?

A I would say probably two percent of his time was on other jobs.

Q You have told the Court that you hired him as a helper, didn't you?

A Yes, sir.

Q You hired him as a helper. What does a helper do?

A In that particular instance, I go around and set up a machine, and a helper comes out after I have got the machine operating, and the helper completes the

job, in other words, finishes running the parts on it after I have the machine set up.

Q. All right. Isn't a fact that he worked on a large number of jobs other than making these aircraft parts?

A. I don't think so, sir, not a large number.

Q. All right. Well, can you name us some of the jobs that he worked on?

A. I can't recall any that he worked on outside of aircraft parts.

Q. You can't recall?

A. Except just a short length of time, like us moving something, or something like that.

Q. Do you remember the Investors Diversified Services job?

A. No, sir, I don't recall that. If you can go a little further, maybe I can. I don't remember that name.

Q. Do you remember telling Mrs. Kanowski that he worked 130 hours on that job?

A. No, sir, I don't even recall that job.

Q. It is a job at 1201 Main Street.

A. 1201 Main Street?

Q. Yes, sir.

A. He did work on that job.

Q. He did?

A. Yes, sir. He worked—as far as I know, he worked about two weekends. I didn't work that job down there. He worked with some other people.

Q. He worked with Mr. Kanowski, didn't he?

A. Yes, sir.

Q. That is right.

A. But I didn't work on that job; so I wouldn't have any firsthand information on that. It was done downtown, and he was working in the shop, and it was also on a weekend, Saturdays and Sundays.

Q. I see. Did he work on the General Foods job?

A. No, sir. I don't remember that.

Q. Do you know what the General Foods job was?

A. No, sir.

Q. You don't?

A. No, sir.

Q. Well, it was making these big conference tables.

A. Making a big conference table for the General Foods?

Q. Yes, sir.

A. Mr. Arnold can't make a conference table. I know that.

Q. Did he give any help on that job?

A. The only help that he gave, as I said a while ago, was lifting it up or turning it around.

Q. What about this Decorative Blind job?

A. As far as I know, he didn't do anything on that.

Q. How do you know?

A. Well, I was the shop foreman, and I assigned him what to do. I should know.

Q. All right.

Mr. McCracken:

If the Court please, may I have a few questions on redirect?

The Court:

All right.

Re-Direct Examination

By Mr. McCracken:

Q. Mr. Crenshaw, while you were a shop foreman, did you have occasion to see any of these phenolic aircraft parts shipped out from Ben Kanowski?

A. Yes.

Q. Or picked up or disposed of in any way?

A. Yes, sir.

Q. Will you tell the Court of your own knowledge where they were sent or shipped or who picked them up, sir?

A. We have about six or seven different vendors. They went to the Air Corps, to the McDonald Aircraft Corporation at St. Louis, to Chance Vought, to Temco at Grand Prairie, to Douglas at Tulsa, and several of the Air Force Bases.

Q. All right.

Mr. McCracken:

That is all.

The Court:

All right. Call you next witness.

Mr. McCracken:

We would call Mr. James H. Murrell.

JAMES H. MURRELL, being first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. McCracken:

Q. Sir, would you tell the Court your name, please, sir?

A. J. H. Murrell.

Q. Speak up nice and loud, now. Where are you employed, sir?

A. Chance Vought Aircraft, Inc.

Q. In what capacity are you employed, sir?

A. Supervisor of outside production.

Q. Supervisor of outside production, sir?

A. Production.

Q. Just what does that name imply, sir; what are your duties, for example?

A. Well, that covers the procurement of machines and all types of tools.

Q. I see, sir. Now, how long have you been in that position with Chance Vought, sir?

A. I would say approximately four and a half years.

Q. I see, sir. Sir, in your capacity as purchasing supervisor, have you had any occasion to have any contact with a company here in Dallas known as the Ben Kurowski, Inc?

A. Yes.

Q. What type of relation have you had with them, sir?

A. We procure—

The Court:

Speak out so I can hear you.

A. We procure some of our machined phenolic parts from them.

(By Mr. McCracken:)

Q. I see, sir. What do you do with these phenolic parts, sir?

A. They are used in our aircraft that we manufacture.

Q. I see, sir. Have you been requested to bring any documents from your records at Chance Vought to Court, sir?

A. Yes, yes, I was requested to bring some.

Q. I see, sir. May I see them, please? Have you brought any contracts that Chance Vought had with the defendant Ben Kanowski during the year 1954 and '55?

A. I have some—a copy of a purchase order that we have with them.

Q. All right.

A. Which is a contract.

Q. Would you show that to me, please, sir?

A. This is dated 1956.

Q. I see, sir. Have you got a '54 and '55, sir?

A. I believe both of these are 1956.

Q. Well, you can, with your own knowledge, tell the Court that you did purchase phenolic aircraft parts from the defendant Ben Kanowski during 1954 and 1955?

A. That is correct, the same type of orders, conditions prevailing, that we have on the order exhibited here of 1956.

Q. All right, sir. Now, sir, can you tell the Court of your own knowledge, what your corporation, your company, did with these parts upon receipt of them from Mr. Kanowski?

A. Well, they are naturally received and inspected and eventually they are inserted into the aircraft that we manufacture.

Q. What type of aircraft, sir?

A. Well, we manufacture the F-8U Crusader; Regulus I; Regulus II, guided missile; it is used in all three of those.

Q. When those aircraft or missiles are completed, what does your company do with them, sir?

A. Well, our customer, of course, is the Navy, and they are fob Dallas, Texas.

Q. They are picked up by the Navy here, Naval Aviators?

A. Yes, sir.

Q. From where do they go then?

A. Wherever the Navy wants to transfer them, all fob Dallas.

Q. Were you subpoenaed to bring to the Court some figures showing the amounts of the dollar volume amounts of the purchases made by your company from Ben Kanowski, Inc. during 1954-1955?

A. Yes, sir.

Q. May I see them, please? Do you have a total made, sir?

A. I have a total of each of the years, 1954, '55 and '56.

Q. Where were these made, sir?

A. These totals are from the purchasing records.

Q. Purchasing records. Your records kept under your direct supervision?

A. Well, not under my direct supervision, but under another supervisor.

Q. I see, sir. Would you tell the Court what the totals of purchases of phenolic aircraft parts by your company were in 1954 and 1955?

A. Well, on order with Ben Kanowski, $50,331.28.

Q. $50,331.28?

A. That is right, sir.

Q. For '55?

A. For '55, it was $34,292.02.

Q. $34,292.02, is that right, sir?

A. That is right.

Mr. McCracken:

That is all.

The Court:

Any cross, gentlemen?

Cross-Examination

By Mr. Kelsoe:

Q. Mr. Murrell, for the 1955 figure, do you know what portion of that was work which might have been done for Chance Vought itself and might not have been incoporated into an aircraft?

A. To my knowledge, all of it would be incorporated.

Q. Well, hasn't Mr. Kanowski built you some tool boxes to store your tools in out there, and hasn't he built some ground covers for your planes that stay out there, and some cradles to move your things back and forth in the plant?

A. That is perhaps true. I don't know of those particular orders. I have several buyers that place these. I am certain that the majority—the greater percentage of procurement was used in aircraft.

Q. I see, sir. Could you give us any estimate of what percentage; would you say over fifty?

A. I would say definitely over fifty percent, perhaps over eighty-five percent.

Q. I see, sir. Now, the aircraft is turned over to the goverment here in Dallas—

A. That is correct.

Q. —that is right, is it not? Are there a number of parts in this order which are experimental parts?

A. That is perhaps true. Some are experimental. We had, of course, experimental orders on our airplanes that we built, the missile as well as the Crusader.

Q. And those things are never sold, are they?

A. Yes.

Q. If they are not accepted, they are not sold, are they, sir?

A. That is correct. They must be accepted by the Navy.

Mr. Kelsoe:
I believe that is all.

Mr. McCracken:
That is all.

The Court:
Call your next witness.

Mr. McCracken:
May this witness be excused?

The Court:
You gentlemen excuse your witnesses.

Mr. McCracken:
You may be excused, sir, and thank you.

We call Mr. Will Shackelford, if the Court please.

WILL W. SHACKELFORD, being first duly sworn, testified on his oath as follows:

Direct Examination.

By Mr. McCracken:
Q. Would you state your name to the Court, please.
A. Will W. Shackelford.
Q. And by whom are you employed, sir?
A. Temco Aircraft Corporation.
Q. And in what capacity, sir?
A. General supervisor of purchasing.
Q. Have you had any occasion to have ever had any contact in your capacity as purchasing supervisor with the defendant Ben Kanowski, Inc.?

A. Yes, sir.

Q. What was the relationship that you and your company, sir, had with the defendant?

A. We purchased certain phenolic parts.

Q. I see, sir. And what do you use these parts for, sir?

A. They are component parts that go into sub-assemblies, which we furnish various prime contractors.

Q. And who are some of those prime contractors, sir?

A. McDonald Aviation Corporation.

Q. Where are they located, sir?

A. St. Louis.

Q. All right, sir.

A. North American Aviation at Columbus, Ohio.

Q. All right, sir.

A. And the Air Force.

Q. Do you recall any other aircraft manufacturing companies you might have furnished parts to, I mean your complete airframes?

A. Yes, sir. We also furnished parts to Boeing, for Republic and for Lockheed Aviation.

Q. All right, sir. During the years 1954 and 1955, have you had occasion to have any dealings, or has your department had any dealings, with the defendant Ben Kanowski?

A. Yes, sir.

Q. And I take it from your earlier testimony that they purchased phenolic aircraft parts, is that right, sir?

A. Yes, sir.

Q. I see, sir. And during those periods, those parts were put in airframes delivered to your prime contractors?

A. That is right, sir.

Q. Were you requested to bring a record of the dollar volume purchased from Ben Kanowski in 1954 and 1955?

A. Yes, sir.

Q. Would you state the dollar volume purchased in 1954?

A. Yes, sir. $1,939.39.

Q. I see, sir. And what in 1955?

A. $2,459.93.

Q. I see, sir. One more question, sir: how did you happen to be here to testify in this case?

A. I was subpoenaed.

Q. All right, sir. Thank you, sir.

The Court:

Any cross, gentlemen?

Mr. Kelsoe:

No cross, Your Honor.

Mr. McCracken:

Your Honor, may this witness be excused?

The Court:

You gentlemen, both of you can excuse witnesses when you are ready; but both of you must agree to it.

Mr. McCracken:

Yes, sir. My question was directed toward counsel for the defendant.

The Court:

Plaintiff rests?

Mr. McCracken:

Yes, sir. We have one more witness, sir, for just a minute. We would call, under the adverse witness Rule, Mr. J. D. Justice, and the records requested of him.

Mr. Kelsoe:

Your Honor, please, J. D. Justice is not an officer of this corporation, and I do not believe that they can call him as an adverse witness.

The Court:

Well, you put him in and swore him.

Mr. Kelsoe:

He came as a subpoenaed witness for them, sir.

J. D. JUSTICE, being first duly sworn, testified on his oath as follows:

Direct Examination.

By Mr. McCracken:

Q. Mr. Justice, sir, I won't keep you but a minute. Are you employed by Ben Kanowski, Inc.?

A. Yes, sir.

Q. First, would you state your name, please?

A. J. D. Justice.

Q. J. D. Justice?

A. Yes, sir.

Q. Pardon me for not asking you first, sir. How long have you been so employed, sir?

A. Approximately two and a half years.

Q. I see, sir. Were you employed in 1955?

A. Yes, sir.

Q. By Ben Kanowski, Inc.?

A. Yes, sir.

Q. Is is true, sir, that you are the person that is most familiar with the phenolic aircraft parts business of Mr. Kanowski insofar as the records are concerned?

A. I would think so, yes.

Q. I only have this to ask you, sir: are you familiar with the destinations of the shipments of various parts manufactured by Mr. Kanowski?

A. Yes, sir.

Q. Would you tell the Court, please, sir, what some of those destinations are of parts that you have that the company has manufactured, phenolic aircraft parts?

A. That we actually shipped or are picked up at our shop?

Q. Either way.

A. They are picked up by Chance Vought Aircraft.

Q. I see. Has your company ever had occasion to ship parts to McDonald Aircraft at St. Louis?

A. Yes, sir.

Q. Have you ever had occasion to ship parts to the Greenville Air Force Base at Greenville, Mississippi?

A. No, sir.

Q. What was shipped?

A. Stocks, cut phenolic.

Q. Maxwell Air Force Base in Alabama?

A. Same thing.

Q. Douglas Aircraft at Tulsa, Oklahoma?

A. Yes, sir.

Q. You have shipped parts there?

A. Yes, sir.

Q. I see, sir. And, of course, Temco Aircraft here at Dallas picks theirs up?

A. Yes, sir.

Mr. McCracken:

That is all, sir. Thank you very much.

The Court:

Any cross, gentlemen?

Cross Examination.

By Mr. Kelsoe:

Q. Mr. Justice, when were you employed by Ben Kanowski?

A. I believe it was the latter part of September or first of October of 1954.

Q. What do you do out there, sir?

A. At the present time?

Q. No, at that time, sir.

A. At that time. I did a little bit of everything, stamping parts, shipping them, working in the interior decorating, mostly, learning the fabrication and so forth.

Q. Most of your work was in the interior decorating business?

A. Yes, sir.

Q. Tell the Court what kind of business Mr. Kanowski was in at the time that you went there.

A. He did custom pieces on furniture and upholstery and interior decorating, rework and refinish and repair household furniture.

Q. Is that type of business somewhat seasonal?

A. Yes, sir.

Q. Was the business of making parts gone into as an incidental to this main business?

A. That was my understanding, yes, sir; it was a sideline.

Q. I will ask you, Mr. Justice, if you were there, well, first of all, they brought out about these shipments

to out of state. Would you tell the Court if you know what percentage of business that Ben Kanowski does goes out of the State of Texas?

A. I don't know the exact percentage; but it is a very small percentage.

Q. To the best of your ability—

A. Yes, sir.

Q. —what is it?

A. Oh, I would say one or two percent.

Q. These pieces that you mentioned here having been shipped outside of the State of Texas, were they very small in the amount of money involved?

A. Yes, sir.

Q. Now, I notice Mr. Justice, that you are somewhat disabled?

A. That is right.

Q. Did Mr. Arnold have a disability while he worked there?

A. I believe so, yes, sir.

Q. Would you tell the Court the nature of that?

Mr. McCracken:

Your Honor, we object to that. He couldn't possibly know that, sir.

The Court:

Well, I don't know whether he could or not. This gentleman is under oath.

A. Well, I go on what he has told me is all.

By Mr. Kelsoe:

Q. All right, sir.

A. That he has a hip trouble.

Q. Did he have trouble—could he do all types of work there in the shop?

A. Well, I understood he couldn't do heavy lifting, things of that nature.

Q. Well, could he stand for long periods of time?

The Court:

Could he or did he?

A. No, sir. We have stools. They changed it off from one to the other.

The Court:

All right.

(By Mr. Kelsoe):

Q. In other words, he would stand a while and sit a while, is that right?

A. Yes, sir.

Q. Now, I want you to tell the Court if this man worked on other jobs other than phenolic.

A. Yes, sir.

Q. Can you tell the Court some of those jobs?

A. Well, he worked on the leasehold improvements that we did during that time.

Q. How long did you all work on those leasehold improvements?

A. Approximately ten days to two weeks. I believe it was.

Q. All right, sir. Did he work on any screens for the Home Show?

A. Yes, sir.

Q. Tell the Court how long he worked on those.

A. How long he actually worked, I don't know. It was approximately two weeks in there that nearly everybody worked on them.

Q. Will you tell the Court if he worked on this Investments Management job?

A. Yes, sir.

Q. How long was that work going on?

A. It was about three weeks or so of that work, as well as I remember.

Q. Did he also work on other furniture jobs?

A. Yes, sir, from time to time.

Q. I wish you would tell me whether or not there were weeks at a time that the man didn't do any work at all or phenolic aircraft parts.

A. The only actual time that I know of is when we made the improvements while Mr. Kanowski and them were out of the city. Everybody worked on that.

Q. I see. How about when they were doing this job down town?

A. I believe he worked down town practically all of the time.

Q. Were there weeks at a time that you know of that seventy-five percent of his work was done on furniture and stuff like that and the balance on phenolics?

A. Yes, sir.

Q. Were there weeks that he worked more than fifty percent on furniture and the balance on aircraft parts?

A. Well, in those same weeks, yes, sir

Mr. Kelsoe:

All right.

The Court:

All right.

Mr. McCracken:

Are you through?

Mr. Kelsoe:
That is all.

Mr. McCracken:
If the Court please, I would like one or two questions on re-direct:

Re-Direct Examination.

By Mr. McCracken:
Q. Mr. Justice, you said that you came to work for Ben Kanowski, Inc. when, sir?
A. I believe it was in September or October of 1954.
Q. I see. Were you in the employ of Ben Kanowski, Inc. when they did the Investments Securities job, sir, at 1201 Main Street?
A. Yes, sir.
Q. You were. Now, I will ask you just one other question. You have mentioned various jobs at—of course—that you noticed that Mr. Arnold has worked on. Do you know of your own knowledge, sir, how much he worked on those jobs; did you see him, in other words, out of the shop, or doing whatever he was doing on those jobs?
A. On the jobs?
Q. Yes, sir.
A. That were out of the shop, no.
Q. All right, sir. Now—

The Court:
All right. Call your next witness.

Mr. Kelsoe:
May I ask him one other question, Your Honor?

The Court:
All right.

Re-Cross Examination.

By Mr. Kelsoe:
Q. You knew he wasn't in the shop, isn't that right?
A. That is right.
Q. And you only make these phenolic aircraft parts in the shop?
A. That is right.
Q. One other question: did you ever see him drinking any vodka out there on the job?
A. Actually see him, no, sir.
Q. Well, was he under the influence out there?

Mr. McCracken:
Well, we object to that question. That calls for a conclusion that he is not capable of stating, Your Honor.

The Court:
Answer the question.

A. Would you repeat it, please?

(By Mr. Kelsoe):
Q. I say was he under the influence of vodka out there; had he been drinking? That is what I am driving at.
A. Yes, sir.

Mr. Kelsoe:
All right. That is all.

The Court:
All right. Call your next witness.

Mr. McCracken:
Plaintiff rests, if the Court please.

The Court:
Plaintiff rests.

Mr. Kelsoe:
At this time, if Your Honor please, we would like to present a motion to the Court, if the Court would care to hear it.

The Court:
Well, I don't know what you want to present. I have to pass on whatever you bring up.

Mr. Kelsoe:
All right. If Your Honor please, I would like to present to the Court the motion of the defendant for a directed verdict at this time.

The Court:
Yes. Overrule the motion.

Mr. Kelsoe:
All right, sir. Take the stand, Mr. Kanowski.

BEN KANOWSKI, being first duly sworn, testified on his oath as follows:

Direct Examination.

By Mr. Kelsoe:
Q. State your name, please, sir.
A. Ben Kanowski.

Q. Where do you live, Mr. Kanowski?

A. I live next door to our place of business at 5513 Maple in Dallas.

Q. How old a fellow are you?

A. Forty-one years old.

Q. How long have you been in the furniture business and interior decorating?

A. For about sixteen or seventeen years.

Q. I want you to tell the Court the type of business that you are in out there, Mr. Kanowski.

A. Our business out there is interior decoration and custom furniture.

Q. Tell the Court what you do in that regard.

A. Well, I myself am a decorator, or am considered as such, and also a designer. We do interiors of offices; we do interiors of homes, as well as special jobs of all types from time to time.

Q. Is that type of work somewhat seasonal, Mr. Kanowski?

A. The decorating itself is definitely seasonal in that the best times usually are in the spring and the fall.

Q. All right, sir. As the result of that condition, what, if anything, did you do in an effort to remedy it?

A. Well, we have tried a number of things to take up the slack, something to do for a sideline. At one time, I had a small chair. I tried these screens with hopes of being able to fill in time on those, and many other items that we have used, and eventually, we got into the fabrication of phenolic.

Q. All right. What is phenolic, Mr. Kanowski?

A. Well, it is a phenol resin impregnated into a cotton cloth under extreme pressure and made into sheets.

Q. I see, sir. Where do you buy that phenolic?

A. We buy our phenolic, or the bulk of it, from Curt Waggoner in Grand Prairie, Texas.

Q. Are they a lumber yard or concern that stores that stuff here?

A. Well, they are a sales agency and have a warehouse where they disperse materials very similar to a lumber yard, yes, sir.

Q. I see. Mr. Kanowski, when did you hire Mr. Arnold?

A. Well, it was in October of '54.

Q. Where did you learn that—of Mr. Arnold?

A. I learned of Mr. Arnold through Howard Crenshaw who was my shop foreman.

Q. Is Mr. Crenshaw the brother-in-law of Mr. Arnold?

A. I believe that is true, yes, sir.

Q. What did he tell you about the boy at the time that you hired him?

The Court:

Never mind about what he told him.

Mr. McCracken:

That is right, sir.

(By Mr. Kelsoe):

Q. Did you hire Mr. Arnold with the knowledge that he had a disablement or impairment?

A. Yes, sir.

Q. Did you try to work as many disabled people as you can?

A. Yes, sir.

Q. Now, directing your attention to the time that Mr. Arnold worked there, do you work in the shop?

A. I do.

Q. Do you work in these homes and in these office buildings where you do your interior decorating?

A. I do.

Q. Can you name for the Court a number of jobs that Mr. Arnold worked on?

A. I can name any number of jobs that Mr. Arnold worked on; because he was no different than anyone else; everybody worked on them.

Q. What did you hire Mr. Arnold as?

A. As a helper.

Q. As a helper?

A. Yes, sir.

Q. What are the duties of a helper?

A. To do whatever he is told to do and whatever needs to be doing.

Q. Did you hire him just to make phenolic aircraft parts?

A. No, sir. He had no equipment or tools, and as far as I know, he had no experience in this other than the time he had worked in an airplane factory in California, or something.

Q. All right, sir. Did you prepare a list of jobs that he worked on other than these aircraft parts that he has told about?

A. I have a list with me of jobs that he assisted on and worked on; yes, sir.

Q. All right, sir. Will you let us have those? Just read those, if you will, giving the month and the names of the jobs that he worked on.

A. In October of '54, we built a number of pieces for a Mrs. Feldman.

Q. Is that in a private residence?

A. That is in a home.

Q. Did he work on that job?

A. He assisted on that job.

Q. All right, sir.

A. We also commenced work on the Murmanill Corporation and the Southern Consolidated Company, which is also a part of Dixie Chrome.

Q. What did you do for them?

A. Well, Murmanill was quite an extensive job and carried over for a period of three or four or five months, and we made paneling, furniture, remodeled some offices, made molding and many other wood items of various nature for installation at 1201 Main.

Q. All right, sir.

A. Southern Consolidated was primarily formica furniture made for Mr. Clint Murchison, Sr.

Q. All right, sir. Any other jobs?

A. Well, we also did work in that month for Wrather Oil Company.

Q. Did Mr. Arnold work on all of those jobs, to your knowledge?

A. It would almost be impossible for everyone there to have worked on those jobs because of the nature of our shop. We have only four or five mechanics in the business.

The Court:

The question was did he work on them.

The Witness:

Yes, he worked on them, yes, sir.

The Court:

All right. That is all he asked.

(By Mr. Kelsoe):

Q. In November, what jobs did he work on?

A. There was the Buffalo Oil Company job, which was some office furniture. There was Mr. and Mrs. Hightower furniture for their home. American Liberty Oil Company, furniture for them; Murmanill Corporation; Otis Pressure Control; Mr. William F. Alexander; Hunt Oil Company, and American Liberty Pipeline Company.

Q. What did you do for those concerns?

A. All of these were in the nature of furniture repair, or from scratch, custom work.

Q. Did he work on those jobs?

A. He assisted on each and every job in some capacity.

Q. Any more jobs?

A. In December, we had Mrs. Coughlin's work, which was primarily repairing and mending of things. I happen to remember that; because he happened to put some new blocks under some chairs at my direction. Mrs. Rice, we built some pieces for her. Mr. Martin, some bedroom furniture and living room furniture, and which he helped glue up and handle. Logan Ford; Clem Lumber Company; Elizabeth Bacon; Beck's Fried Chicken Shop, where every man in the shop worked on it for not just days but several weeks.

Q. What did you do at Beck's Fried Chicken Shop?

A. We built some big planting boxes, a cigar stand.

Q. In other words, you built the counters and fixtures that went into it?

A. That is right. And we built some fixtures in an apartment over on Lomo Alto, a large what not shelf, cabinet. Mr. Arnold did the work on it and Mr. Crenshaw helped him, and then there was a period of from ten days to two weeks where we made stands and moved the equipment and painted it that came in the month of December.

Q. Did Mr. Arnold work on that?

A. Everybody did, Arnold included. In January, we did more work for the Murmamill Corporation, and then the Banks Upshaw Company, we made some calendar boards for, which Mr. Arnold practically did by himself. We did some more work for Mr. Martin and did some more work for Southern Consolidated. In February, more work for William F. Alexander; Southern Consolidated;

General Foods, which was the large conference table brought up sooner. We put new formica on the top and made a new frame for the table. It took every hand we had to handle it. American Liberty Oil Company; Tecon Corporation; Investments Management, all more furniture. In March, we did work for M.J.A. Corporation; American Liberty Oil Company; National Ventilated Awning Company. We made some spacers that had been worn on equipment of theirs.

Q. Did Mr. Arnold work on those?

A. Mr. Arnold did some work on those. Dr. Joe Simmons; E. E. Fogelson; did more work for Logan Fox; Investments Management; American Liberty Oil Company; Grayson Gill; Bud Yenne; Island Properties, which was a large screen we made which Mr. Arnold did considerable work on, and more work for Mr. Marshall.

Q. Now, did he work on all of those jobs?

A. He did some work on each and every job, but some of them, he spent days working on them.

Q. All right, sir.

A. In April, we had Beck's Fried Chicken; Murman Corporation, continued; Wrather Oil Company; Mr. Jack Dillard, which was a job Mr. Crenshaw and Mr. Arnold and Flavius Wiginton practically completed by themselves. It was a large, builtin bookcase that Mr. Arnold helped on. Investments Management Company and General Foods Corporation, some pieces we did for them, and Mr. George Harrell. In May, we continued Dr. Joe Simmons' work and Beck's Fried Chicken. Then, we made the screens during thi time for the Home Show, and the best I recall, there was no phenolic run for a week to ten days and the figures would substantiate; because the volume of the aircraft work dropped. These screens were made to make jobs for them. I really didn't need them. I could have laid them off, and it would have made no difference

I got no money out of it. Investments Management; Hunt Oil Company; Logan Ford; General Foods, and Mr. and Mrs. Hightower. This was in May. In June, we continued work on the Jack Dillard job; Logan Ford; Investments Management; Mr Jack Burrus, and more work on Island Properties. In July of 1955, we commenced work, or either in June or July, for Harry Bass, Jr., in which Mr. Arnold assisted in making several pieces of furniture, helped me personally. Did work for Mr. Clint Murchison and Dr. Simmons. In August, 1955, we commenced work again on Drilling and Service Company, some screens, which Mr. Arnold assisted on. We did continued work for Harry Bass, Jr.; Mr. George Harrell had more work done, and Jenell Corporation had some work done, and which Mr. Arnold helped some on Jenell, because it was a large planter of formica. Dr. Simmons; Mr. Ed Proctor; Clint Murchison, and did some work for Serv-Air Corporation and also some work for the First National Bank of Dallas. And in September, we continued on with Mr. Harry Bass, Jr. and Dr. Joe Simmons. In addition, we did some work during this period of time I just happened to think of which was Parkland Hospital, some big planters for there which Mr. Arnold worked on.

Q. To your knowledge did he work on all of these jobs here that have been mentioned?

A. In some form or another, to some extent or another, he worked a little on each and every one of these jobs.

Q. To your knowledge, were there a number of weeks that he didn't do any work on phenolic aircraft parts at all?

A. There had to be, yes, sir.

Q. To your knowldge, were there a number of weeks in which he did seventy-five percent or more of his work on furniture and things of that nature?

A. Yes, sir.

Q. To your knowledge, were there weeks that we worked more than fifty percent of his time—

A. Yes, sir.

Q. —on furniture and things of that nature?

A. There was, yes, sir.

Q. Did you work along with him on a number of these jobs?

A. I did, sir.

Q. Now, Mr. Kanowski, tell the Court whether or not a larger percentage of your business comes from the furniture and the type of interior decorating that you have told us about during this period of time.

A. As of today, the bulk of our business comes from the decorating—

Mr. Kelsoe:
That is all.

A. —including all of the years past.

The Court:
Any cross?

Mr. McCracken:
Yes, sir, if the Court please.

Cross Examination.

By Mr. McCracken:

Q. Mr. Kanowski, from your direct examination, am I to assume that you are engaged principally in the manufacture of a good deal of furniture?

A. I do not manufacture furniture, no, sir.

Q. When you were talking a moment ago about making desks—

A. That is true.

Q. Making screens?

A. Yes, sir.

Q. Making chairs?

A. Yes, sir.

Q. Is that not making furniture?

A. It is making furniture.

Q. Well, that is what I am asking you, sir. Do you make the furniture?

A. We make custom.

Q. From the raw material?

A. From the raw material.

Q. From the board, we will say?

A. From the board, yes, sir.

Q. You buy lumber?

A. Yes, sir.

Q. Woods?

A. Yes, sir.

Q. Metal and so forth and turn out the finished product?

A. Right.

Q. All right, sir. Did you have an occasion to take out a disabled worker or handicapped worker certificate on Mr. Arnold from the United States Department of Labor?

A. I didn't know about it until last week. If I had, I would have gotten one, or he would never have worked there.

Q. But you didn't take one out, did you?

A. I didn't know about it. I have other disabled men there, too.

Q. But the fact remains that you didn't, is that right, sir?

A. Right.

Q. Sir, you said that when you employed Mr. Arnold that he didn't have any tools?

A. That is true.

Q. Is it not true that he did have some tools with him?

A. About $2 worth.

Q. What were they?

A. He had a little hammer and a rule.

Q. What else?

A. And as far I know, that was it.

Q. Yes, sir. Now, sir, you said a moment ago—you listed quite a number of jobs, and several places you said that Mr. Arnold assisted you with various jobs, and you named quite a list of them?

A. Yes, sir.

Q. Now, what I would like to know, sir, is what did he do?

A. What did he do?

Q. Yes, sir.

A. For example, on 1201 Main, in the paint room, he held the end of an outfit that we had set up to put these panels in to keep it from tipping over, that I remember.

Q. All right, sir.

A. I also remember looking after that he didn't climb because if he fell and hurt himself, it would be pretty near fatal to him, and down town at 1201 Main, I insisted that he not get on a ladder to help put up the molding down there, which he was willing to do, don't misunderstand me, but I insisted that he not do it.

Q. Sir, are we to imply that Mr. Arnold did not spend the biggest part of his time while he was employed by you on jigsaws, drill presses, lathes, and so forth, turning out phenolic aircraft parts?

A. I have no way to know that, no way in the world.

Q I am asking you if you can tell the Court honestly one way or the other whether or not you have—whether or not Mr. Arnold spent the biggest part of his time while he was in your employ manufacturing and turning out

from raw phenolic certain parts which you subsequently sold to other sub-contractors or prime contractors?

A. In the first place, sir, it is not raw phenolic.

Q. All right, sir. Phenolic of some kind.

A. And in the second place, we do not manufacture it.

Q. You do make parts?

A. We do not manufacture it, no, sir.

Q. What do you do?

A. It is manufactured somewhere else. I don't know where it is manufactured.

Q. Not the phenolic, the parts?

A. The parts, we fabricated.

Q. That is what I am talking about. Can you tell the Court truthfully that Mr. Arnold did not spend the biggest part of his time turning out those little parts of phenolic?

A. I would say that maybe sixty percent, maybe sixty-five percent, of his time was spent on that.

Q. How do you estimate that?

A. On the basis of the amount of business we did, working on the furniture, through the time tickets and job tickets.

Q. Isn't it true that you were away from the plant a great part of the time?

A. Yes, sir.

Q. And to your knowledge, you do not know what Mr. Arnold may have been doing?

A. I knew from the other men and from Mr. Crenshaw what had been going on.

Q. Did you hire Mr. Arnold as a decorator maker of furniture?

A. I hired him as a helper.

Q. What did you intend for him to do when you hired him?

A. To help.

Q. At what, sir?

A. Anything that came up.

Q. Is it not a fact, Mr. Arnold spent the biggest part of his time working on the lathes and jigsaws making the phenolic parts?

A. He did that if he was doing wood; he also used the same equipment; ours is a cabinet shop; we used jigsaws on furniture; we used lathes on furniture. We did not have a machine lathe when Mr. Arnold was there.

Mr. McCracken:
All right, sir.

Mr. Kelsoe:
May I ask him another question, Your Honor?

The Court:
All right.

Re-Direct Examination.

By Mr. Kelsoe:

Q. Is it customary in the interior decorating industry for you to make custom furniture or custom desks or things of that nature?

The Court:
It doesn't make any difference whether it is customary or not. That is what he is doing.

Mr. Kelsoe:
All right. That is all. I would like to call Mrs. Kanowski.

MRS. BEN KANOWSKI, being first duly sworn, testified on her oath as follows:

Direct Examination.

By Mr. Kelsoe:

Q. Mrs. Kanowski, have you prepared the total sales for the period from October 1, '54 through September 30, 1955?

A. I have.

Q. Will you tell the Court what your total sales were during that period, twelve months?

A. The total sales in that period, $99,117.52.

Q. Now, do you have that—do you have the total sales for the three months of October, November and December of 1954?

A. The total sales, sir?

Q. Yes ma'am.

A. $33,125.95.

Q. All right. Now, during the three months of September, October and November of 1954, what portion of that $33,125.95 had to do in any way with phenolic?

A. The total sales in phenolic during that three month period was $12,904.56.

Q. All right. What were the total sales during the entire twelve months period of phenolic?

A. The total sales in phenolic during the entire period was $39,751.71.

Q. Your phenolic sales is what percentage of your total sales, approximately?

The Court:

Well, you can figure that yourself

Mr. Kelsoe:

All right.

(By Mr. Kelsoe):

Q. It is approximately thirty-five percent, isn't it, Mrs. Kanowski?

A. Approximately.

The Court:

You can figure it yourself.

Mr. Kelsoe:

All right, Your Honor.

The Court:

I can figure it myself, too. All right. Anything else?

(By Mr. Kelsoe):

Q. Now, Mrs. Kanowski, in regard to shipment in interstate commerce, tell us what percentage goes in interstate commerce.

Mr. McCracken:

I don't believe she would know that. That calls for a question of law.

The Court:

I don't know whether she knows or not. I can't keep her from answering it.

By Mr. Kelsoe:

Q. Will you answer the question?

A. Will you please state the question again?

Q. I say what percentage of your products do you ship outside of the State of Texas or sell outside of the State of Texas?

A. The only thing we ship outside of the State of Texas would be over two or three percent in phenolic work.

Q. Does any of your furniture go outside of the State?

A. No, sir.

Q. Is all of it made out there at your place of business in the State of Texas?

A. It is.

Q. All right. Now, the thirty-five percent figure on phenolic, does that include phenolic other than aircraft parts?

A. Yes, sir. That would include small sales of just an order of phenolic.

Q. I see.

A. Where there was no labor done on it at all.

Q. Is there any way of determining whether or not your sales of phenolic are twenty-five percent or more in your opinion, does more than twenty-five percent of your business constitute aircraft parts during this period of time here?

A. Well, it would constitute at least that much.

Q. At least that much.

Mr. Kelsoe:

That is all.

The Court:

Any cross?

Mr. McCracken:

If the Court please, I don't believe there will be.

The Court:

Call your next witness.

Mr. Kelsoe:

We rest Your Honor.

The Court:

All right. Both sides close.

Opinion of the Court.

In this case, 6741, Arnold against Kanowski, Incorporated, the issue resented by the pleadings and testimony and counsel is whether the law invoked by the plaintiff, to-wit, the Fair Labor Standards Act, as shown at 29 U.S.C.A., Section 216(b), has been violated in failure to pay him for overtime work, and also whether he was actually engaged in manufacturing commerce which passed into interstate commerce. In addition to the amount sued for by the plaintiff, to-wit, $396.00, he sues for a thousand dollars attorney's fees. Of course that is unconscionable; but I am just referring now to the matters as pleaded here before the Court and as shown by the testimony.

I find as facts, Gentlemen, that the plaintiff has worked overtime, to-wit, more than 40 hours, and is entitled to recover the sum of $396.00, and that a reasonable attorney's fee is $25.00; that the facts also support, and I so find, the contention of the plaintiff that he was engaged in the manufacture of goods which were shipped in interstate commerce, to-wit, paraphernalia of and for airplanes which passed from state to state, and such goods were shipped from Texas into other states of the natio ..

As a conclusion of law, I find that the plaintiff is entitled to recover $396.00, plus $25.00 attorney's fees. I ask you to prepare a judgment, please, to be okayed by the other side as to form.

AMENDED DESIGNATION OF RECORD.

Filed 3-21-57.

(Title Omitted.)

Mr. Clerk:

Appellant wishes to designate the following instruments to be prepared in a transcript for the appealing of this cause to the Fifth Circuit Court of Appeals sitting in New Orleans, Louisiana, to wit:

1. Plaintiff's Original Petition.
2. Defendant's Original Answer.
3. Judgment,
4. Notice of Appeal,
5. Supersedeas Bond,
6. Designation letter dated February 25, 1957.
7. Transcript of Court proceedings,
8. Amended Designation of Record.

JOHANNES and KELSOE,
G. H. KELSOE,
Attorneys for Appellant.

2536 Fairmount Street,
Dallas, Texas,
RI2-2227.

MOTION TO HAVE ORIGINAL EXHIBITS SENT UP.

Filed 3-21-57.

(Title Omitted.)

Now Comes the defendant, Ben Kanowski, Inc., a Texas corporation, and files herein its Motion with the

Court to authorize the Federal District Clerk to forward the original exhibits in this cause to the Fifth Circuit Court of Appeals in New Orleans, Louisiana.

Wherefore, premises considered, defendant prays that this motion be in all respects sustained.

JOHANNES and KELSOE,
G. H. KELSOE, JR.,
Attorneys for defendant.

2530 Fairmount Street,
Dallas, Texas
RI2-2227

ORDER TO SEND UP ORIGINAL EXHIBITS

Filed 3-21-57.

(Title Omitted.)

Be It Remembered that on this the 21 day of March 1957 there came on to be heard defendant's motion to transmit the original exhibits in this cause to the Appellate Court, namely, the Fifth Circuit Court of Appeals in New Orleans, Louisiana.

Be it, therefore, Ordered, Adjudged and Decreed that said original exhibits are hereby ordered transmitted with the record in this cause by the United States District Clerk to the Clerk of the Fifth Circuit Court of Appeals in New Orleans, Louisiana.

WM. H. ATWELL.
(William H. Atwell),
United States District Judge

CLERK'S CERTIFICATE

I, JOHN A. LOWTHER, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript of the record and all proceedings in cause number 6741 Civil, wherein John W. Arnold is plaintiff and Ben Kanowski, Inc., is defendant, as fully as the same now remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said Court at Dallas, Texas, this the 21st day of March A.D. 1957.

JOHN A. LOWTHER,
Clerk, U. S. District Court,
(Seal) Northern District of Texas.
(Seal)

By ELIZABETH McCLELLEN,
Deputy.

81 [Minute entry of argument and submission—November 7, 1957 (omitted in printing).]

82 In the United States Court of Appeals for the Fifth Circuit

No. 16603.

BEN KANOWSKY, INC., APPELLANT

v.

JOHN W. ARNOLD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Opinion

December 10, 1957

Before CAMERON, JONES and WISDOM, *Circuit Judges*.

CAMERON, *Circuit Judge*: Suing under the Fair Labor Standards Act,[1] "which creates the cause of action herein asserted by the plaintiff," appellee Arnold recovered judgment against appellant Ben Kanowsky, Inc. for overtime wages and attorney's fee[2] for the hours in excess
83 of forty per week worked as appellant's employee. The appeal is based upon appellant's contention that the Federal statute did not apply to its operations, and in the alternative, that appellant's business was exempted from the provisions of the Act.[3] The appeal will be decided on the exemption, the terms of which are quoted in the footnote. The facts are simple and largely undisputed.

Ben Kanowsky, operating under appellant's corporate title, had conducted the business of furniture and interior deco-

---

[1] 29 U.S.C.A. 216(b).

[2] 29 U.S.C.A. 207(a).

[3] 29 U.S.C.A. 213(a): "The provisions of sections 206 and 207 of this title shall not apply with respect to • • • (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. • • •

rating in the City of Dallas in a building next door to his residence for more than sixteen years. The business decorated the interiors of homes and offices, repaired and upholstered furniture, and made furniture to order and delivered it to its customers in Dallas.

Because its business was somewhat seasonal, he tried through the years to hit upon a side line "to take up the slack." He experimented with manufacturing for local sale chairs, screens and other items; and, at the time of appellee's employment the side line consisted of "the fabrication of phenolic."[1]

84 Appellant obtained these phenolic sheets from various sources in the State of Texas. Utilizing its lathes, saws and other machinery installed in connection with its furniture business, it fabricated the phenolic sheets into parts for airplanes and automobiles,[2] and it sold sheet phenolic to customers who desired to purchase it. Practically all of the items handled by appellant were delivered at its place of business, and less than three per cent were shipped out of the State.

To counter the undisputed proof of the basic nature of appellant's business as a retail furniture and decorating establishment, appellee testified that he spent nearly all of the period of a little less than a year he worked for appellant in the fabricating of these phenolic parts. He put on, as a part of his case, employees of the appellant and representatives of two airplane manufacturing companies to show that the parts purchased by them at appellant's place of business[3] were installed in airplanes manufactured for the United States Government; and from this and appellant's proof, it appeared that the dollar volume of phenolic sales was slightly in excess of twenty-five per cent of appellant's total sales during the period covered by this testimony.[4] This was the only

---

[1] Defined by Kanowsky as "a phenol resin impregnated into a cotton cloth under extreme pressure and made into sheets."

[2] Appellee thus described this phase of appellant's work: "[Phenolic] . . . is a thermo-setting plastic used for blocks, bumpers, fair leads, cable guides pulleys. . . . It is used extensively in the aircraft industry, and in automobile timing gears."

[3] In many cases, these parts were fabricated to conform to drawings furnished by the companies.

[4] This proof showed that, during the period of appellee's employment, appellant's total sales aggregated $90,117.52, of which $33,125.95 "had to do in any way with phenolic."

85 evidence in the record tending to bring in question the proof of the fundamental character of appellant's business. This proof did not show the portion of the phenolic sales which consisted of bulk phenolic, the portion which was sold for use locally in automobile repair, and it failed to show that any of it was for "resale."

Appellee kept his own time, turning in a ticket each day showing the hours worked, and was paid weekly. There is no evidence that he ever mentioned to his employer that he claimed time and one-half for overtime work, or that either he or the employer ever conceived or expressed any idea that the relationship between them was covered by the Fair Labor Standards Act.

The question of whether a business is within the Fair Labor Standards Act and, if so, whether it comes within the quoted exemption, remains an issue of fact to be decided according to the evidence presented in each case. The decisions of this Court bearing closest resemblance to this one on the facts are White Motor Co. v. Littleton, et al, 1941, 124 F. 2d 92; Mitchell, Secretary of Labor v. T. F. Taylor Fertilizer Works, Inc., 1956, 233 F. 2d 284, and Boisseau v. Mitchell, Secretary of Labor, 1955, 218 F. 2d 734. In White, mechanics employed by the Dallas branch of a large truck manufacturing concern sued under the Fair Labor Standards Act for wages alleged to be due them, and this Court held that the case should have been dismissed because the operation was not subject to the Act. Some of the language of the opinion[*] is appli-

86 cable here:

"Section 13(a)(2) of the Act provides that Section 6 thereof shall not apply with respect to any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. The establishment in which these employees were engaged sold the products manufactured by the parent organization elsewhere, serviced and performed special changes in those products, and conducted a repair and reconditioning department. • • •

"The word *retail* is not defined by the Act. Given its common and ordinary acceptation when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word *wholesale*, meaning a sale in large quantity to one who intends to resell. The character of the

[*] 124 F. 2d 93, 94

sale is not altered by the use to which the consumer may put the purchased commodity. These sales were preponderantly retail although the products sold were used subsequently for commercial purposes." [9]

Much of the argument contained in appellee's brief stresses the contention that he was engaged in manufacturing, in that he spent most of his time in fabricating phenolic parts
87 which found their way into the hands of aircraft manufacturers.[10] This, he contends, nullifies appellant's claim that it was a retail sales establishment. That argument is answered by our decision in Taylor, supra. There, the employer was conducting a dry mixing plant in which the various chemicals entering into fertilizer were assembled and mixed and when the manufacturing process was completed, the fertilizer was delivered to customers from its plant in Georgia. While deliveries were so made from the plant, all sales were made either from an office several blocks away or by traveling salesmen who called on the farmers at widely separated places. The witnesses for the Secretary of Labor testified that sales to farmers were not retail sales, but were at wholesale because they were for farm use rather than for personal or household use. We rejected both the idea that the employer's business was not a sales establishment because what it sold was entirely manufactured by it, and the idea that it was not a retail establishment because its sales were to farmers who did not consume the fertilizer but used it for the growing of crops which, in most cases, were sold to others; and we held that the business came within the exemption under discussion.

It is settled, of course, that upon proof that a business is engaged in commerce as defined by the Act,[11] the employer is

[9] This decision was rendered before the addition, by the Act of Oct. 26, 1949, of the second sentence of the quotation set forth in fn. 3. Its fundamental reasoning is applicable, however, the Taylor and Boisseau cases demonstrating that Congress had added that sentence only in an effort to clarify the meaning of the sentence preceding it. Moreover, the evidence does not show that the goods or services of appellant were for resale; and appellant's business was, without question, recognized in the industry as one of retail sales and services.

[10] In the oral argument, however, appellee conceded that the Act would not apply to appellee provided the proof showed that appellant was a "retail or service establishment" within the meaning of the exemption claimed.

[11] Cf. 29 U.S.C.A. § 203.

under the burden of proving that it is, nevertheless,
88 exempt from the Act's application because its business consists of the operation of a retail sales or service establishment. But such proof need be made only by a preponderance of the evidence and without the necessity of overcoming any presumptions.

This whole phase of the problem before us was fully dealt with in the *Boisseau* case, *supra*. The Trial court [12] had held the Act to apply and denied a claimed exemption to an employer engaged in the business of printing or reproducing letters and advertising matter and mailing them in interstate commerce. This ruling was based upon its finding that all of the employees worked on goods destined for interstate transportation, and that Boisseau had adduced no evidence that such services or sales are regarded as retail in the industry.

We rejected these conclusions, and held Boisseau entitled to the exemption because his business must be "regarded as a segment of the overall group of local industrial and commercial establishments," and as belonging in "a general category of small, local establishments performing necessary services for local businesses of all types." We expressed the opinion "that the trial court placed too heavy a burden upon appellant," and that the employer had amply sustained the burden necessary to establish the exemption claimed, and we concluded with these words:

"Since it is not questioned that all of appellant's services are rendered to customers located in Louisiana and that
89 none of his services are for resale, it follows that the provisions of Section 13(a)(2) exempt appellant's employees from the minimum wage provisions of the Act."

We reach a like conclusion here, finding that, as a matter of law, appellant, operating this small interior decorating establishment with four or five operatives and making substantially all of its sales at its place of business in Dallas and to customers in the State of Texas, was exempt from the provisions of the Fair Labor Standards Act. The judgment of the court below is reversed and judgment rendered here in favor of appellant.

REVERSED AND RENDERED.

---

[12] Mitchell, Secretary v. Boisseau, 118 F. Supp. 480.

90 In United States Court of Appeals

No. 16603

BEN KANOWSKY, INC.

v.

JOHN W. ARNOLD

Judgment

December 10, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and judgment rendered here in favor of appellant, Ben Kanowsky, Inc.;

It is further ordered and adjudged that the appellee, John W. Arnold, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

92 In the United States Court of Appeals for the Fifth Circuit

No. 16603

BEN KANOWSKY, INC., APPELLANT

v.

JOHN W. ARNOLD, APPELLEE

Appellee's Petition for rehearing

Filed January 16, 1958

John W. Arnold, Appellee, respectfully requests the Court to grant a rehearing in the above entitled matter in that this Court's opinion of December 10, 1957, is contrary to the admitted facts in the record and to law.

It is clear from the record that John W. Arnold was throughout the period in question engaged in the production of goods

for interstate commerce. The Court, however, holds
93 Ben Kanowsky, Inc., has sustained the burden of proving that it is a retail establishment within the meaning of the Fair Labor Standards Act. This exemption is set forth in 29 U.S.C.A. Section 213(a)(2) and exempts:

"Any employee employed by any retail or service establishment.

"(A) More than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located.

"(B) A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale *and* is recognized as retail sales or services in the particular industry;" [Italics and lettered designations supplied.]

The employer in order to prove its right to the exemption must show (Boisseau v. Mitchell, 218 F. 2d 734, 737 (C.C.A. 5, 1955) (a) that more than 60 per cent of his annual dollar volume of sales is made within the State. The Appellant meets this test. (b) that 75% of his annual dollar volume of sales is not for resale. Arguably Appellant may meet this test. (c) that 75% of his annual dollar volume of sales is recognized as retail sales in the particular industry. On the admitted facts the Appellant fails to meet this test.

This Court in its opinion overlooks the Appellant's failure to prove the third point and fails to recognize the clear proof to the contrary which is found in the record. The Court states that the basic nature of the Appellant's business
is a retail furniture and decorating establishment and
94 that the dollar volume of phenolic sales was only slightly in excess of 25% of Appellant's total sales during the period covered by the testimony. This is incorrect as the following statement by Mrs. Kanowsky at page 73 of the record will show:

"Q. Will you tell the Court what your total sales were during the period, twelve months?

"A. The total sales in that period, $99,117.52.

* * * * *

"Q. All right. What were the total sales during the entire twelve months period of phenolic?

"A. The total sales in phenolic during the entire period was $39,751.71."

In other words, the total sales of phenolic during the period in question amounted to 40% of all sales—not 25%. The figure of $33,125.95 used by the Court in its footnote 7 is incorrect; this figure refers to total sales of all products during the three months period of October, November and December, not to sales of phenolic for the twelve months period. During this three months period the total sales of phenolic in fact amounted to $12,904.56; approximately 40% for this three months period also.[1]

95 The Court in its opinion likewise states that there is no proof of what portion of the phenolic sales were used in aircraft parts and what for other purposes, but at page 75 of the record Mrs. Kanowsky testified as follows:

"Q. Is there any way of determining whether or not your sales of phenolic are twenty-five percent or more in your opinion, does more than twenty-five percent of your business constitute aircraft parts during this period of time here?

"A. Well, it would constitute at least that much."

In other words, on the undisputed testimony of Appellant, 40% of the business of the period under consideration was taken up with the sale of phenolic and at least 25% of the total business constituted sales of phenolic aircraft parts.

This Court states that the phenolic was not sold for resale. That may be literally correct since the parts were sold for incorporation into aircraft which were themselves sold but certainly there is nothing in the record and there could be nothing in the record to indicate that such sales were "recognized as retail sales * * * in the particular industry," and without such proof the Appellant must fail as this court has fully recognized. Boisseau v. Mitchell, supra.

We urge that there has been a plain misreading of the record by the Court as indicated by its opinion and by the

---

[1] NOTE: The record on this point is clear at page 73 wherein it is stated

"Q. Now do you have that—do you have the total sales for the three months of October, November and December of 1954?

"A. The total sales, sir.

"Q. Yes ma'am.

"A. $33,125.95

"Q. All right. Now, during the three months of September, October and November of 1954, what portion of that $33,125.95 had to do in any way with phenolic?

"A. The total sales in phenolic during that three month period was $12,904.56."

quotations above given. We urge that the opinion be withdrawn and that upon rehearing a new opinion in favor
96 of Appellee in accordance with the admitted facts and the law be entered.

Respectfully submitted.

ARTHUR J. RIGGS
OF CARRINGTON, COWAN, JOHNSON,
BROMBERG & LEEDS,
1900 Mercantile Bank Building,
Dallas 1, Texas, Attorneys for Appellee.

ARTHUR J. RIGGS,
JOE H. MCCRACKEN, III,
Of Counsel.

102 In the United States Court of Appeals for the Fifth Circuit

No. 16603

BEN KANOWSKY, INC., APPELLANT

v.

JOHN W. ARNOLD, APPELLEE.

Brief for James P. Mitchell, Secretary of Labor, United States Department of Labor, in support of the petition for rehearing as amicus curiae

Filed February 14, 1958

The holding that appellant's interior decorating-phenolic parts manufacturing establishment meets all the statutory requirements for exemption under Section 13(a)(2) (including the requirement that 75 percent of its annual dollar volume of sales "is not for resale and is recognized as retail sales * * * in the particular industry) rests on the Court's finding that the interior decorating business is retail in nature and on its further finding that the phenolic sales amounted to just "slightly in excess of twenty-five percent of appellant's total sales."

As pointed out in the petition for rehearing, the admitted facts show that the phenolic sales actually amounted to approximately 40 percent of appellant's total sales—not

103 25 percent as the Court mistakenly found. Although the Court's error in this regard is sufficient reason for reconsidering the decision, it is the Government's position that even if the phenolic sales had not exceeded the statutory tolerance of 25 percent, the Section 13(a)(2) exemption (the only exemption considered by the Court) would still be inapplicable since that exemption does not apply to an establishment which engages in manufacturing, and the fabrication of airplane parts clearly constitutes manufacturing. We shall also show that the closely related "retail establishment" exemption provided in new Section 13(a)(4), which allows manufacturing or processing activities, does not apply either since that exemption, like the Section 13(a)(2) exemption, strictly limits the amount of non-exempt sales to 25 percent of the establishment's total sales, and the sale of parts for incorporation into other goods which are sold by the purchaser of such parts is a sale for "resale" as that term is used in the retail establishment exemption provisions.

The Section 13(a)(2) exemption is essentially the exemption provided in the original 1938 Act, with certain clarifying additions. The closely related Section 13(a)(4) exemption mentioned above, is a new exemption provided by the 1949 Amendments. Prior to the 1949 Amendments, the courts including this Court, had uniformly held the Section 13(a)(2) exemption to be inapplicable to an establish-
104 ment engaged in manufacturing or processing activities.[1] The purpose of the clarifying additions to this exemption was not to change the exemption's basic scope but to make it clear that the exemption could apply even though the sales or services might be for a business purpose. In par-

[1] Collins v. Kidd Dairy & Ice Co., 132 F. 2d 79 (C.A. 5) (holding this exemption inapplicable to a producer-distributor of artificial ice); Davis v. Goodman Lumber Co., 133 F. 2d 52 (C.A. 4) (roller manufacturing department of a retail lumber yard); Fred Wolferman, Inc. v. Gustafson, 169 F. 2d 759 (C.A. 8) (candy kitchen in a food store); Walling v. Goldblatt Bros., 152 F. 2d 475 (C.A. 7), certiorari denied, 328 U.S. 854 (drapery workshop for employer's retail outlets); Walling v. American Stores Co., 133 F. 2d 840 (C.A. 3) (manufacturing food products for sale in employer's retail outlets); Guess v. Montague, 140 F. 2d 500 (C.A. 4) (rebuilding and reconditioning secondhand machinery); Grant v. Bergdorf & Goodman Co., 172 F. 2d 109 (C.A. 2) (custom manufacture of women's clothing).

ticular, the amendment to this section was not intended to extend the exemption to include establishments engaged in manufacturing activities. This was clearly stated in the Statement of the House Managers which accompanied the Conference Report on the amendments as enacted (95 Cong. Rec. at 14932):

"The exemption, however, does not apply to any manufacturing activities since any such activities, when conducted by a retail establishment, if exempt, are intended to be exempt under Section 13(a)(4) discussed below."

Clearly, therefore, since appellant's establishment was substantially engaged in fabricating parts for the aircraft industry and since the employee whose status is involved in this case was principally engaged in such manufacturing activities, any possible claim which appellant may have to exemption must rest on Section 13(a)(4).

105 The Court, however, gave no consideration to Section 13(a)(4), probably because it was not specifically pleaded by appellant or mentioned by the parties and also because of the concession mentioned in footnote 10 of the decision. It is mainly for this reason that we sought permission to file this brief.

Section 13(a)(4) is no broader than Section 13(a)(2), except, of course, to the extent that it allows manufacturing or processing activities. Indeed, to qualify for exemption under Section 13(a)(4), an establishment must first qualify under Section 13(a)(2). Thus, Section 13(a)(4) incorporates the conditions of Section 13(a)(2) and prescribes some additional requirements. This statutory analysis of these two exemptions is specifically confirmed by the accompanying House Managers' Statement, cited *supra*. After noting that "First, it is made clear that the establishment must qualify as an 'exempt' retail establishment under Section 13(a)(2)," the Statement points out that the new 13(a)(4) exemption prescribes "six tests" (95 Cong. Rec. 14932):

"An establishment will be exempt under this provision of the conference bill if it meets the following six tests:

"1. Over 50 percent of its annual dollar volume of sales of goods must be made within the State in which the establishment is located.

"2. Seventy-five percent of its annual dollar volume of sales of goods must not be for resale.

"3. Seventy-five percent of its annual dollar volume of sales of goods must be recognized as retail sales in its industry.

"4. The establishment must be recognized as a retail establishment in its industry.

106 "5. More than 85 percent of the establishment's annual dollar volume of sales of goods which it makes or processes must be made within the State in which the establishment is located.

"6. The goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods * * *."

Since appellant's sales of phenolic airplane parts amounted to much more than 25 percent of its total sales (see discussion infra, p. 7-8), and since appellant did not—indeed could not (see discussion infra, p. 6-7)—show that these sales were not for "resale" and were "recognized as retail sales * * * in the particular industry," the Section 13(a)(4) exemption is plainly inapplicable. Directly in point here is this Court's decision in Tobin v. Celery City Printing Co., 197 F. 2d 228. In that case, the Court pointed out that the requirement that 75 percent of an establishment's total sales must be "recognized as retail sales * * * in the particular industry," is "one of the prerequisites of such exemption," and reversed the trial court which had allowed the exemption, on the ground that the evidence in the record "fails to establish at least that element." 197 F. 2d at 229.

While the Celery City case was remanded for further evidence, that course of action is not indicated here since the record shows that the sales involving airplane parts were for "resale" as that term is used in the exemption, and that these sales exceeded the 25 percent statutory tolerance.

It is undisputed that the phenolic parts which appellant made for and sold to the aircraft industry were incorporated into airplanes or "sub-assemblies" and resold in that form.

Thus, the witness from Chance Vought Aircraft, Inc.
107 whose purchases from appellant amounted to $34,292.02 in 1955 (R. 47), testified that the parts were incorporated into aircraft which his company manufactured for the

U.S. Navy—the F-8U Crusader and two guided missiles known as Regulus I and Regulus II (R. 46–47). Similarly, the witness from Temco Aircraft Corporation (whose purchases from appellant amounted to almost $2,500 in 1955 (R. 51)), testified that his company used the parts in making subassemblies for the Air Force and for prime contractors of aircraft, such as the McDonald Aviation Corporation of St. Louis, Missouri and North American Aviation of Columbus, Ohio (R. 50).

That sales of this type are sales for "resale," as the term is used in the exemption, is made clear beyond doubt by the Act's new Section 3(n) and by the legislative history of the 1949 Amendments. Thus, new Section 3(n) contains a special definition of the term "resale" which was adopted for the express purpose of excluding such sales in the limited situation involving building materials. This exclusionary definition reads as follows:

"SEC. 3(n). 'Resale' shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry."

Obviously, if Congress had not intended that sales of the type here involved should be classified as sales for "resale," Section 3(n) would have been unnecessary; and Congress itself made this clear. Thus, in explaining the second test of the "retail establishment" exemption, as set out above, the House Managers' Statement says:

108 "The second test provides that in order for an establishment to be exempt not less than 75 percent of its annual dollar volume of sales of goods or services (or of both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, *goods are to be considered as sold for resale even though the purchaser sells them in an altered form.* In section 3(n) there is a special definition of the word "resale" which is applicable in the case of building materials. [95 Cong. Rec. 14932; emphasis added.]"

Similarly, in explaining the meaning of the term "resale" as used in the "retail establishment" exemption provisions, the

Statement of the Majority of the Senate Conferees on the Conference Report of the Amendments, as enacted, unequivocally declares that the term "is used in its ordinary sense to include resale in the same or an altered form" (95 Cong. Rec. 14877).

It is thus clear that there is no room for argument (cf. Pet. for Rehg., p. 2) that the phenolic sales involving airplane parts are anything other than sales for "resale" as that term is used in the exemption. This being so, it follows that appellant would not be entitled to the Section 13(a)(4) exemption unless it appeared that these sales were within the statutory tolerance of 25 percent, and the record does not show this. On the contrary, it shows that the airplane parts sales were well in excess of the 25 percent tolerance.

Although the decision states that the *employee's*[2] "proof did not show the portion of the phenolic sales which consisted of bulk phenolic [or] the portion which was sold for use locally in automobile repair,"[3] his proof does establish that the phenolic sales involving airplane parts were considerably in excess of the statutory tolerance. Thus as already indicated, the testimony of the two aircraft company witnesses offered by appellee shows that their companies alone purchased more than $36,000.00 worth of phenolic parts from appellant in 1955 (R. 47, 51). Therefore, since appellant's total annual dollar volume of business was in the neighborhood of $99,000 (R. 73), at least 35 percent of its sales were sales for resale.

109

For the reasons stated above, the petition for rehearing should be granted and, on rehearing, the decision reversing

[2] As this court pointed out in the instant decision, "It is settled, of course, that upon proof that a business is engaged in commerce as defined by the Act, the employer is under the burden of proving that it is, nevertheless, exempt from the Act's application because its business consists of the operation of a retail sales or service establishment." The statement quoted in the text, however, implies that the employee has the burden of disproving any claimed exemption.

[3] The Court's reference to phenolic sales "for use locally in automobile repair" indicates that it may be of the view that such sales would not be sales for "resale." It is clear, however, that they, too, would be in the nonexempt category.

the judgment below and allowing the exemption should be withdrawn.

Respectfully submitted.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
SYLVIA S. ELLISON,
LAWRENCE P. HOCHBERG,
Attorneys,
United States Department of Labor,
Washington 25, D.C.

EARL STREET,
Regional Attorney.

FEBRUARY 1958.

110 [Affidavit of service (omitted in printing).]

111 In the United States Court of Appeals for the Fifth Circuit

No. 16603

BEN KANOWSKY, INC., APPELLANT

v.

JOHN W. ARNOLD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Order modifying opinion and denying petition for rehearing

March 12, 1958

Before CAMERON, JONES and WISDOM, *Circuit Judges*

PER CURIAM: Upon considering the petition for rehearing, along with the brief of the Secretary of Labor filed in
112 support thereof, it is ordered that the figure $33,125.95 in Note 7 of the opinion filed December 10, 1957, be and it is changed to $39,751.71; and the opinion having been so modified, it is further ordered that the petition for rehearing be, and it is denied.

113 [Clerk's certificate to foregoing transcript omitted in printing.]

115 Supreme Court of the United States

No. 32 Misc., October Term, 1958

JOHN W. ARNOLD, PETITIONER

v.

BEN KANOWSKY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Order allowing certiorari

May 4, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 888 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

117 Supreme Court of the United States

No. 888, October Term, 1958

[Title omitted.]

Order granting motion of respondent to dispense with printing of record and briefs

June 29, 1959

On consideration of the motion of respondent to dispense with printing of the record and briefs in this case,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

U. S. GOVERNMENT PRINTING OFFICE: 1959

[illegible]

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] Misc.

JOHN W. ARNOLD,

Petitioner,

v.

BEN KANOWSKY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. H. KELSOE, JR.,
858 Mercantile Dallas Bldg.,
Dallas, Texas,
Counsel for Respondent.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

Citation of Authorities

Cases

Statutes

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 837 Misc.

JOHN W. ARNOLD,

Petitioner,

v.

BEN KANOWSKY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Petition Devoid of Reasons Necessary to Support Granting of Writ

This is the usual and ordinary suit brought by an employee of Respondent seeking recovery of overtime wages under the Fair Labor Standards Act. The Court of Appeals under the facts held Respondent exempt under the Fair Labor Standards Act as he operated a small business of upholstering, furniture repairing and interior decorating next door to his house under the corporate style of Ben Kanowsky, Inc., and had, on occasions fabricated some phenolic aircraft parts.

The reasons relied upon in urging that this Court grant a writ of certiorari completely fail to meet the requirements of Rule 19 of this Honorable Court and the established precedents in point. In *Layne and Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387,* this Court said that in the usual action for a writ of certiorari, the same would not be granted unless the issue involved was of great public importance or that an embarassing conflict existed between Circuit Courts of Appeal. These conditions were again emphasized in *Magnum Import Company, Inc. v. Coty, 262 U. S. 159,* wherein it is stated at page 163 as follows:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioner has failed to show that any of the conditions requisite to the granting of a petition for writ of certiorari are present. The final ruling of which Petitioner seeks review is not in conflict with any decision of other Circuit Courts of Appeal and no unusual question of public importance is involved.

In this connection, Respondent would show that *Section 213 of the Fair Labor Standards Act (29 U. S. C. 213)* is clear and unambiguous, and that the Courts, in applying this exemption statute, have *necessarily had to follow the facts adduced in each case* as the Honorable Court of Appeals has done in this cause. Particularly, Respondent would show that the cases cited in Appendix C of the

petition for writ of certiorari are not in conflict with each other or with the decision of the Court of Appeals in this cause as each of the said cases therein is distinguishable from the other *based upon the facts* applied under the exemption statute, viz. *Section 213, Fair Labor Standards Act.*

In the *Aetna Finance Company v. James P. Mitchell* case, cited by Petitioner, it is specifically pointed out by the Court that the Aetna Finance Company has offices throughout the United States and that its business is highly integrated and controlled out of St. Louis, Missouri, and this suit involves the Providence, Rhode Island, branch. Thus, clearly the facts in this cause show that the employees are engaged in commerce and by virtue of this office being highly integrated with the St. Louis main office, the Aetna Finance Company failed to meet the burden of proof to bring it within the exemption of *Section 213 of the Fair Labor Standards Act* as shown on page 32 of Petitioner's application for writ of certiorari.

The *Kentucky Finance Company* case presents an entirely different proposition in that this is an isolated loan company in Louisville, Kentucky, which makes loans only in a local area and the evidence as produced in the case showed that such a local isolated loan company was recognized in the industry as a retail sale or service. Thus, the *Kentucky Finance* cause, by virtue of facts, is clearly distinguishable from the *Aetna* cause. The case of *James P. Mitchell v. Kroger Company*, is likewise distinguishable

on facts in that the Kroger Company is an Ohio corporation operating stores throughout the country. *The Department of Labor stipulated that the stores of Kroger were retail establishments* and this suit is *based only upon the auditors of Kroger who travel in interstate commerce from store to store conducting audits.* The Court, under these facts, held that the auditors are employees of the chain rather than of a particular store and thus the chain's dollar volume coming from stores located throughout the country does not qualify as a retail establishment under *Section 213*, but that its local stores do so qualify as retail establishments under *Section 213 of the Fair Labor Standards Act.* Thus, once again this cause is distinguishable upon facts from the other causes In *James P. Mitchell v. Pascal System, Inc.*, it is once again facts which distinguished said case from the other cases in that the defendant is engaged in renting automobiles but in addition to renting automobiles, the said defendant buys a large number of automobiles which are not needed for the operation of its business and which are, in turn, sold in interstate commerce, resulting in profits to the company to the extent that it would not be qualified under *Section 213 of the Fair Labor Standards Act.*

From this discussion, it is clear that there is no conflict between the opinions of the Courts of Appeals and that *it is the facts of each case which are determinative of the decision of the Court of Appeals* and thus no jurisdiction exists in this cause for the granting of an application for writ of certiorari under Rule 19.

II. Statement and Authorities

Petitioner, John W. Arnold, instituted suit in the United States District Court seeking a recovery of overtime wages under the Fair Labor Standards Act. Petitioner was at all times paid in excess of the minimum wage and thus his sole and only action is for overtime in excess of 40 hours worked per week. The work week is thus the determining time factor in this cause. Respondent answered stating that it was principally engaged in the business of upholstering, furniture repairing and interior decorating and that incidental to its principal business as aforesaid, it had on occasions fabricated some phenolic aircraft parts. It is undisputed that the upholstering, furniture repairing and interior decorating were not in any way connected with interstate commerce and it is further uncontroverted that there were a number of weeks at a time in which not a single one of Respondent's employees (the same being only four or five in number) worked on any items other than furniture repairing, interior decorating or upholstering, thus being in no way connected with interstate commerce. Petitioner was further instructed to keep a time sheet each day of the hours worked on each particular job which he failed and refused to do. Petitioner failed entirely to prove what weeks, if any, he worked on phenolic aircraft parts, thus failing to meet the burden of proof cast upon him as a matter of law. Respondent, on the other hand, satisfied the requirements of a retail and service

establishment under *Section 213 of the Fair Labor Standards Act (29 U. S. C. 213)*. In this connection, the undisputed proof shows that Respondent was engaged in making the sales of goods and services, that the total annual dollar volume of such goods and services was at least 75% from sales and services recognized as retail sales or services in the particular industry and not for resale, and that more than 50% of its sales and services were made within the State of Texas, the same being the state in which Respondent is located. The nature of Respondent's business has above been described, thus complying with the making of sales and services. The record, by the testimony of Mrs. Kanowsky, shows that the sales of aircraft parts were not in excess of 25%, thus the remaining 75% of the sales and services of Respondent were retail sales not for resale and the evidence is further undisputed that not more than two or three per cent of Respondent's total sales were made outside the State of Texas, thus clearly bring Respondent within the exemption as a matter of law and as duly held by the Court of Appeals under the facts developed in this cause. (Tr. 75) (Tr. 54-57).

The decision of which Petitioner seeks review of this Honorable Court by virtue of his petition for writ of certiorari is recorded in *250 F. 2d 47* and the said opinion as written indexed and headnoted therein clearly shows and establishes recognition of the exemption statute as written by Congress and based upon the facts of this cause, and there does not exist, as a matter of law, any judicial pre-

cedent or reason under Rule 19 for the granting of a writ of certiorari prayed for herein.

Mitchell, Sec. of Labor v. T. F. Taylor Fertilizer Wks., Inc., 233 F. 2d 284;

Boisseau v. Mitchell, Sec. of Labor, 218 F. 2d 734;

Jax Beer Co. v. Redfern, 124 F. 2d 172.

Certainly the proof is undisputed that the basic nature of Respondent's business is a retail decorating establishment in that it upholsters, repairs furniture, decorates, and on occasion makes a piece of custom furniture which is not for resale and is in a small quantity to satisfy a certain decor. Since Respondent's main business is interior decorating and all interior decorators do, on occasion, have to make a custom piece of furniture to fit into the decorating scheme, Respondent's business is clearly that which is generally regarded as a retail establishment in the industry and in the locale in which it is located. This is certainly in accordance with the definition of Congress in the *Fair Labor Standards Act.*

Petitioner makes reference to whether or not there is testimony that more than 25% of Respondent's business during the period in which the Petitioner was employed pertained to phenolic aircraft parts. The testimony in the record is susceptible to the interpretation that 25% of the total business of Respondent's phenolic sales were aircraft, which interpretation would mean that Respondent's phenolic aircraft sales were considerably less than 25% of its annual dollar volume, or the other interpretation to which

it is susceptible is that 25% of the total business of Respondent was aircraft, thus under either interpretation Respondent qualifies for the exemption provided by law under the *Fair Labor Standards Act.*

It is further to be noted that the testimony of the witness from Chance Vought Aircraft as to the sum of $34,292.02 purchased in 1955 from Respondent, and the sum of $2,500.00 purchased from Respondent by Temco Aircraft in 1955, are not the test for determining the amount of sales made to those companies during the time of the employment of Petitioner because the *record undisputedly shows* (Tr. 73) that the Petitioner worked from October 1, 1954, through September 30, 1955; therefore, the sales for the months of October, November and December of the year 1955 would not be applicable in considering the percentage of phenolic sales to these aircraft concerns. (Tr. 73). The facts are clear that Respondent qualifies for the exemption as a matter of law and facts are determinative of the exemption in each case.

CONCLUSION

In conclusion, it is urged that the petition for writ of certiorari be denied because:

1. This case does not come within the class of cases which this Court holds subject to review pursuant to Rule 19 of this Court.
2. The Court of Appeals properly applied the exemption statute of the *Fair Labor Standards Act*, viz. *29 U. S. C. 213*, to the facts adduced in the trial of this cause.

3. There is no conflict between the opinions of the Courts of Appeal when the facts giving rise to the opinions of the Courts of Appeal are analyzed in each respective cause.

Respectfully submitted,

G. H. KELSOE, JR.,
858 Mercantile Dallas Bldg.,
Dallas, Texas,
Counsel for Respondent.

[redacted]

COPY FOR THE SECRETARY

OF LABOR

AS

MARCUS GARVEY

LE COPY

No. 69

In the Supreme Court of the United States

October Term, 1959

JOHN W. ARNOLD, PETITIONER

v.

THE KANSAS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

HAROLD C. [redacted],
Acting Assistant,
ERNEST [redacted],
Assistant Solicitor,
SYLVIA [redacted],
[redacted],
Attorneys,
Department of Labor,
Washington 25, D.C.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 60

JOHN W. ARNOLD, PETITIONER

v.

BEN KANOWSKY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court (R. 76) is unreported. The opinion of the Court of Appeals is reported at 250 F. 2d 47. Its opinion on petition for rehearing is reported at 252 F. 2d 787.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910, 917 (29 U.S.C. 201, *et seq.*), are set forth in the Appendix, *infra*, pp. 21-23. The provisions particularly involved here are Sections 13(a)(2) and 13(a)(4), which read as follows:

> SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any

employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * * or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.

QUESTIONS PRESENTED

1. Whether an establishment engaged in manufacturing activities, completely unrelated to its retail functions, can qualify for exemption from the requirements of the Fair Labor Standards Act as a "retail or service establishment" under Section 13(a)(2) or Section 13(a)(4) of the Act, as amended in 1949.

2. Whether sales of phenolic aircraft parts incorporated by the purchasers into aircraft or "subassemblies" and resold in that form are sales "for resale" within the meaning of Sections 13(a)(2) and

13(a)(4) of the Fair Labor Standards Act, as amended in 1949.

3. Whether an establishment can qualify for exemption under Section 13(a)(2) or Section 13(a)(4) of the Act, as amended in 1949, in the absence of any evidence that it meets the "industry recognition" tests set forth in those provisions.

STATEMENT

This action was instituted under Section 16(b) of the Fair Labor Standards Act to recover overtime pay for hours in excess of forty per week worked by petitioner while in respondent's employ.

1. Respondent, which conducts an interior decorating and custom furniture business in Dallas, Texas, engages on the same premises in the fabrication of aircraft parts from phenolic, a phenol resin impregnated into a cotton cloth under extreme pressure and made into sheets (250 F. 2d at 48–49). Petitioner was employed by respondent from October 17, 1954 through September 2, 1955 (R. 2, 20–22), primarily in the fabrication of phenolic parts (R. 25, 26, 34, 38, 39, 71).

2. Among the purchasers of phenolic parts from respondent were Temco Aircraft Corporation and Chance Vought Aircraft, Inc., located in Texas, and McDonald Aircraft Corporation of St. Louis, Missouri (R. 44, 53). A representative of Chance Vought testified that his company purchased over $34,000 worth of phenolic parts from respondent in 1955, and used these parts in aircraft and missiles which were sold to the United States Navy (R.

44–47). A representative of Temco testified that phenolic parts purchased from respondent (in the amount of about $2,000 annually) were used in manufacturing aircraft sub-assemblies furnished to the Air Force, or to prime contractors, many of whom were located outside the State (R. 49–51). Respondent also shipped a small amount of phenolic directly outside the State (R. 53, 55, 74).

3. During the year beginning October 1, 1954, respondent's sales of phenolic and phenolic parts amounted to $39,751.71, approximately 40% of its total sales (during this period) of $99,117.52 (R. 73; opinion on rehearing, 252 F. 2d 787). Respondent's secretary-treasurer admitted that phenolic aircraft parts alone accounted for at least 25% of the company's total sales (R. 75). Respondent introduced no evidence concerning the amount or nature of sales of phenolic in forms other than aircraft parts, and no evidence to show that its sales of phenolic or phenolic aircraft parts are "recognized as retail * * * in the particular industry," or that its business is "recognized as a retail establishment in the particular industry."

4. The District Court found that petitioner was engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and, upon respondent's admission that petitioner had been paid for overtime hours only at straight time rates, entered judgment for petitioner for $396 unpaid overtime compensation plus an attorney's fee of $250 (R. 11).

The Court of Appeals reversed upon the ground that respondent was exempt from the Act's overtime requirements under Section 13(a)(2) as a "retail or service establishment," apparently resting this holding upon "the basic nature of [respondent's] business as a retail furniture and decorating establishment" (250 F. 2d at 49). Referring to the evidence concerning respondent's sales of phenolic and phenolic parts, the court held that the record "failed to show that any of it was for 'resale'" (*ibid*). The opinion rested its reversal of the trial court's judgment solely upon Section 13(a)(2), without any mention of Section 13(a)(4), which applies specifically to retail establishments making or processing the goods they sell. In support of its holding, the Fifth Circuit relied upon its own decisions in *White Motor Co.* v. *Littleton*, 124 F. 2d 92, decided before the 1949 amendment of the "retail" exemption; *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284, involving a fertilizer dry mixing plant making sales to local farmers; and *Boisseau* v. *Mitchell*, 218 F. 2d 734, 738, where it was held that the trial court had erroneously rejected defendant's evidence that its establishment was "'recognized' as retail in the 'particular industry'" (250 F. 2d at 49, 50, 51).

SUMMARY OF ARGUMENT

1. The holding below rests upon the mistaken premise, recently rejected by this Court in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, that the 1949 amendment enlarged the basic scope of the exemption provided in Section 13(a)(2) of the Fair Labor Standards Act for a "retail or service establishment." The amendment was not intended "to broaden the fields of business enterprise to which the exemption would

apply" (359 U.S. at 294). Prior to its amendment in 1949, Section 13(a)(2) was consistently held inapplicable to establishments engaged in processing or manufacturing, and the legislative history of the amendment indicates Congressional awareness and approval of this limitation—highlighted by the enactment of a specific exemption, in Section 13(a)(4), for a retail or service establishment which also "makes or processes at the retail establishment the goods that it sells."

2. Section 13(a)(4), while not considered or discussed in the opinions below, is equally inapplicable to respondent's activities. Viewed in the light of judicial precedent and its legislative history, Section 13(a)(4) was plainly intended to exempt only processing activities incidental to the retail functions of an exempt establishment, and not manufacturing activities which, like those of respondent, are entirely unrelated to any retail sales or services.

3. The record conclusively demonstrates that, even if respondent were eligible to claim exemption under either Section 13(a)(2) or Section 13(a)(4), it could not meet the express statutory prerequisites of these exemptions. Under both sections, 75% of the sales of an exempt establishment must be "not for resale." Respondent's sales of phenolic aircraft parts, which exceed in amount the 25% statutory tolerance for non-retail transactions, are "for resale."

4. The record further shows that respondent likewise did not establish a second prerequisite of exemption prescribed by both Section 13(a)(2) and Section 13(a)(4); *i.e.*, that at least 75% of its sales be "recognized as retail * * * in the particular industry."

Nor did respondent present any evidence to sustain a finding that its establishment was "recognized as a retail establishment in the particular industry," in compliance with the additional requirement of Section 13(a)(4).

ARGUMENT

RESPONDENT IS NOT EXEMPT FROM THE REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT AS A "RETAIL OR SERVICE ESTABLISHMENT."

1. The holding below, that respondent, with its substantial manufacturing "side line," is exempt from the requirements of the Fair Labor Standards Act under Section 13(a)(2) as a "retail or service establishment," rests upon a mistaken view of the scope of that exemption as amended in 1949. As this Court recently pointed out, in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 293, 294, the 1949 amendment of Section 13(a)(2) was not intended "to broaden the fields of business enterprise to which the exemption would apply," but had, on the contrary, only the "specific and particularized purpose" of overruling the then existing judicial and administrative interpretation that no sale for a business purpose could be considered retail. It was, this Court noted, "time and again made plain" in the course of the 1949 legislative proceedings "that the amendment was intended to change the prior law only by making it possible for business enterprises *otherwise eligible under existing concepts* to achieve exemption even though more than 25 percent of their sales were to other than private individuals for personal consumption" (359

U.S. at 294; emphasis added). The first question, therefore, in determining the applicability of the amended Section 13(a)(2), is whether the particular enterprise comes within the concept of a "retail or service establishment" as developed through judicial precedent prior to 1949.

That question must be answered in the negative in the case of this respondent. The whole area of manufacturing, like the financial field considered in the *Kentucky Finance* case, is among the "fields of business enterprise" consistently excluded from the scope of the original retail exemption. The courts repeatedly held that establishments engaged to any extent in manufacturing or processing activities could not qualify for exemption under former Section 13(a)(2). *Grant* v. *Bergdorf & Goodman Co.*, 172 F. 2d 109 (C.A. 2); *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C.A. 3); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4); *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4); *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79 (C.A. 5); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (C.A. 8); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10).

The sponsors of the 1949 amendment to Section 13(a)(2) were fully aware of this interpretation, and approved it. Senator Holland, explaining the amendment, expressly noted that there was "no item of manufacturing involved" (95 Cong. Rec. 12495). The deliberate exclusion from the scope of Section 13(a)(2) of establishments engaged in manufacturing to any degree was highlighted by the enactment of a specific exemption, in Section 13(a)(4), for a retail

establishment which "makes or processes at the retail establishment the goods that it sells." The Conference Managers on the part of the House explicitly noted that Section 13(a)(2), as amended, "does not apply to any manufacturing activities since any such activities, when conducted by a retail establishment, if exempt, are intended to be exempt under section 13(a)(4)" (95 Cong. Rec. 14932). The decision below was, therefore, clearly in error in sustaining respondent's claim to exemption under Section 13(a)(2).

2. Section 13(a)(4) was not mentioned or considered by either of the courts below, probably because respondent did not plead or attempt to prove compliance with the requirements of that subsection.[1] In any event, the nature of respondent's manufacturing "side line" removes it from the basic scope of Section 13(a)(4), as well as from Section 13(a)(2). Under Section 13(a)(4), "an establishment which qualifies as an exempt retail establishment under [Section 13(a)(2)]" may, if it meets specified additional requirements, qualify for exemption "notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells." This section, like the other exemptions in the

[1] The decisions are uniform that exemption under any of the several paragraphs of Section 13 of the Act is a matter of avoidance which must be pleaded affirmatively by the employer, under Rules 8(c) and 12(h) of the Federal Rules of Civil Procedure. *Sams* v. *Beckworth*, 261 F. 2d 889 (C.A. 5); *Beechwood Lumber Co.* v. *Tobin*, 199 F. 2d 878, 881 (C.A. 5); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310, 315 (C.A. 8); *Schmidtke* v. *Conesa*, 141 F. 2d 634 (C.A. 1).

Act, must be strictly construed, and its application limited to those plainly and unmistakably within its terms and spirit. *Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493. As its legislative history clearly shows, Section 13(a)(4) was designed to afford exemption to retail establishments engaged in some processing incidental to their primary retail activities, and not to manufacturing activities which, like respondent's fabrication of phenolic parts, bear no relationship to the retail side of the business. The sponsor of this section explained that it would exempt "candy kitchens," "small custom tailors," and "ice plants" selling "over 75 percent of their product at retail." 95 Cong. Rec. 11216. The House Managers' Statement noted that Section 13(a)(4) would "apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy." 95 Cong. Rec. 14932. The majority report of the Senate conferees pointed out that the section was "intended to exempt only retail establishments, not factories." 95 Cong. Rec. 14877.

Since respondent's fabrication of phenolic is completely extraneous to its retail interior decorating business, only by "straining to bring [its phenolic] activities within the literal words of the exemption" (*Mitchell* v. *Kentucky Finance Co., supra*, 359 U.S. at 296), could Section 13(a)(4) be held to apply. The decisions construing the related Section 13(a)(2) exemption have consistently held that, when an employer operating a "retail or service establishment"

engages in other than retailing activities, the employees in the non-retail department of his business are not within the exemption. See *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 478 (C.A. 7), certiorari denied, 328 U.S. 854 (holding the exemption inapplicable to employees of the central office, bakery, drapery workshop, and warehouses operated by a retail chain store system); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (C.A. 8) (holding that the exemption does not extend to the employees of a candy kitchen operated by the owner of several retail food stores and restaurants); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4) (holding that the exemption applicable to the ordinary operations of a retail lumberyard did not extend to employees engaged on the same premises in the manufacture of rollers for cotton mills). See also *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C.A. 6) (holding the exemption inapplicable to local telegraph agency employees although the telegraph offices were located in retail or service establishments).

The same principle has long been applied to exclude from the scope of other exemptions employees, of an otherwise exempt employer, who engage in non-exempt activities. *Wabash Radio Corporation* v. *Walling*, 162 F. 2d 391 (C.A. 6) (employees operating radio-telephone facilities of wholly-owned subsidiary of exempt common carrier); *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2), certiorari dismissed, 329 U.S. 667 (employees of power plant owned and operated by exempt local trolley carrier); *Nelson* v. *Aguilines*, 70 F. Supp. 497 (S.D.N.Y.) (employees of exempt carrier who

were employed in connection with water transportation not subject to the Interstate Commerce Act); *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501 (D. Minn.), affirmed on this point, 185 F. 2d 74, 77–78 (C.A. 8), certiorari denied, 342 U.S. 812, and *Roland* v. *United Airlines*, 75 F. Supp. 25 (N.D. Ill.) (employees of an exempt carrier who were engaged in non-transportation functions, *viz.*, modification and manufacture of aircraft parts);[2] cf. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52 (C.A. 8), where the court held the exemption for employees employed in "processing" shellfish inapplicable to employees engaged in manufacturing buttons from clam shells.

In the present case, the Fifth Circuit relied upon its own earlier decision in *Mitchell* v. *Taylor Fertilizer Works*, 233 F. 2d 284, holding the Section 13(a)(4) exemption applicable to a fertilizer mixing plant having a general sales office. Although the *Taylor* decision was believed to be clearly erroneous, no petition for certiorari was filed because the peculiar nature of the fertilizer business and the special character of Taylor's operations were not thought to be sufficiently representative of the general problem presented by the new Section 13(a)(4). The *Taylor* decision was clearly an unwarranted expansion and erroneous interpretation of Section 13(a)(4), as was pointed out in the Government's brief in the two "retail establishment" exemption cases which have come before this Court since the 1949 amendments (*Mitchell* v. *Bekins Van & Stor-*

[2] *Contra: Brittan* v. *Hudson and Manhattan*, 50 F. Supp. 37 (S.D.N.Y.); and *Anderson* v. *Southern Pacific Co.*, 62 F. Supp. 730 (S.D.N.Y.), expressly disapproved in the *Aquilino* and *Northwest Airlines* cases, *supra*.

age Co., 352 U.S. 1027; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290[3]). While this Court's decisions in *Bekins* and *Kentucky Finance* did not expressly overrule *Taylor*, in view of the fact that in both cases main reliance was placed by the employers upon *Taylor* as supporting their claims to the exemption, *Taylor's* broad view of the scope of this exemption would seem to have been clearly discredited by the rejection of the contentions of those respondents. The present case extends the erroneous rationale of *Taylor* even further. In its *Taylor* opinion, the Fifth Circuit relied largely upon the fact that the employer's sales outlet and its manufacturing activities constituted "functionally an entity." Here, on the contrary, respondent's fabrication of phenolic is functionally divorced from its retail interior decorating and custom furniture business.

3. Respondent has also failed to bring itself within even the literal words of the exemptions set forth in Sections 13(a)(2), and in 13(a)(4), which require that 75% of the sales of an exempt establishment be "not for resale" and "recognized as retail * * * in the particular industry." These conditions, expressly contained in Section 13(a)(2), are incorporated by reference in Section 13(a)(4), which in terms applies only to "an establishment which qualifies as an exempt retail establishment under [Section 13(a)(2)]." Respondent made no effort to show compliance with these prerequisites of exemption, and, in fact, the record demonstrates affirma-

[3] See petitioner's briefs in *Bekins*, October Term 1956, No. 122, pp. 24–26, and in *Kentucky Finance*, October Term 1958, No. 161, pp. 33–34, fn. 23.

tively that it fails to meet at least one of these statutory tests.

Respondent's sales of phenolic aircraft parts, which exceeded the 25% statutory tolerance for non-retail transactions, were plainly "for resale"—this alone is sufficient to defeat its claim to an exemption. The evidence showed that such parts were incorporated by the purchasers into airplanes or sub-assemblies and resold in that form (see the Statement, *supra*, pp. 3–4). That sales of this type are "for resale" is clear from the Act's restricted definition of that term. Section 3(n), enacted in 1949, 63 Stat. 911, provides:

> "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

The reason for the adoption of this exclusionary definition appears plainly from Senator Holland's statement, in answer to a specific question, that the sale of lumber to a building contractor who used it to erect houses "would be regarded as a sale for resale, and that it would require additional action clearly to exempt that sort of sale from the provisions of the minimum-wage law" (95 Cong. Rec. 12500). Section 3(n), which was thereafter incorporated into the 1949 Amendments, would have been unnecessary if Congress had not intended generally to classify as a "resale" the subsequent sale of a purchased article as part of another product. The Fourth Circuit, in its recent decision in *Mitchell* v. *Sherry Corine Corp.*, 264 F. 2d 831, certiorari denied, 360 U.S. 934, recognized

that the term "resale" was to be construed in a "broad sense."[4]

The legislative reports on the amendment to Section 13(a)(2) confirm this conclusion. The House Managers' Statement explained: "Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form" (95 Cong. Rec. 14932), referring specifically to the "special definition" applicable to building materials contained in Section 3(n). Similarily, the majority of the Senate Conferees unequivocally declared that the term "resale" was "used in its ordinary sense to include resale in the same or an altered form" (95 Cong. Rec. 14877).

The opinion below made no reference to this legislative history. Instead of analyzing respondent's activities in the light of the explicit statutory standards, the court simply relied upon its own conception of "retail," as formulated at a time when the word was "not defined by the Act," in the 1941 decision in *White Motor Co.* v. *Littleton*, 124 F. 2d 92, 93 (C.A. 5).[5] Clearly, this pre-1949 test is no longer

[4] There, the court held that the sale of flight meals for service to passengers, without additional specific charge on first class flights, was "for resale," thus defeating the employer's claim to exemption, since "the meals are purchased by the airlines to be distributed by them to individual passengers for consumption and [that] the airlines are compensated for the cost by making it a constituent element for the charge for transportation." (264 F. 2d at 835.)

[5] "The word *retail* is not defined by the Act. Given its common and ordinary acceptation when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word *wholesale*, meaning a sale in large

controlling, and, of course, cannot serve as a substitute for the express requirement of the 1949 amendment that 75% of the sales must be "not for resale" and "recognized as retail" in the particular industry.

The Fifth Circuit's statement, that petitioner's proof "failed to show that any of [respondent's phenolic business] was for 'resale' " (250 F. 2d at 49), rests either upon a mistaken view of the term "resale," or upon a disregard of the uncontradicted evidence. The secretary-treasurer of the respondent corporation, testifying on its behalf, stated that at least 25% of respondent's total sales of $99,117.52, in its fiscal year 1954–1955, consisted of sales of phenolic aircraft parts (R. 73, 75). In addition, the testimony of two aircraft company representatives showed that the combined purchases of these companies alone exceeded $36,000 in 1955—well in excess of 25% of respondent's total annual sales (R. 44–47, 49–51). Since these witnesses also testified that the phenolic parts were resold by the aircraft companies as a part of the airplanes or sub-assemblies manufactured by them, it is plain that respondent cannot show that

---

quantity to one who intends to resell. The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were preponderantly retail although the products sold were used subsequently for commercial purposes."

The *Taylor* and *Boisseau* cases, also cited by the court below, have no bearing on this question, since in each of those cases it was conceded that the sales in question were not "for resale."

[6] Since the respondent had the burden of proving its claim to exemption (see the discussion *infra*, pp. 17–18), it would not in any event be incumbent upon petitioner to show that his employer's sales were for resale.

75% of its annual dollar volume of sales was "not for resale," and, consequently, cannot qualify for exemption as a "retail or service establishment" under either Section 13(a)(2) or Section 13(a)(4). See *Mitchell* v. *Sherry Corinc Corp., supra.*

4. Respondent likewise failed to show that 75% of its sales are "recognized as retail * * * in the particular industry," another prerequisite of exemption under Sections 13(a)(2) and 13(a)(4). While the opinion below repeated the rule that "the employer is under the burden of proving that * * * its business consists of the operation of a retail sales or service establishment" (250 F. 2d at 50), there is not one word of testimony in the record—not even a self-serving statement by respondent's president—to support a finding that respondent's sales or services are "recognized as retail" in any industry. In the absence of such evidence, respondent's claim to exemption must fail.

The sponsors of the 1949 amendment made it plain beyond doubt that "any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail" (95 Cong. Rec. 12502). This statement by Senator Holland, echoing similar language used by Representative Lucas on the floor of the House (95 Cong. Rec. 11116), was repeated in the report of the majority of the Senate conferees (95 Cong. Rec. 14877). Respondent here made no effort to meet this burden of proof.

The reliance by the court below on its earlier decisions in the *Taylor Fertilizer* case (discussed *supra,*

pp. 12–13), and in *Boisseau* v. *Mitchell*, 218 F. 2d 734, was clearly misplaced, even apart from the substantial doubt of the correctness of those decisions. In each of those cases, testimony was adduced by the employer to the effect that his sales were regarded in his industry as retail, and this evidence was held sufficient to overcome the contrary testimony proffered by the Government. In the present case, where respondent introduced no evidence regarding "industry recognition" of its sales as retail, it is difficult to see why the court refused to follow its own decision in *Tobin* v. *Celery City Printing Co.*, 197 F. 2d 228, reversing a judgment for an employer upon the ground that his proof "fails to establish at least that element" (197 F. 2d at 229).

In order to qualify for the exemption under Section 13(a)(4), respondent was required to show not only that 75% of its sales are not for resale and are recognized as retail in the particular industry, but also that its establishment is "recognized as a retail establishment in the particular industry." The opinion below flatly states (250 F. 2d at 50, n. 9) that "appellant's business was, without question, recognized in the industry as one of retail sales and services." However, the "particular industry" doing the recognizing is not identified, and the record contains no evidence indicating that respondent's business was "recognized as retail" in the interior decorating trade, or the custom furniture business, or by other fabri-

cators of phenolic.[7] In sum, the record refutes the findings which underlie the Fifth Circuit's reversal of the judgment of the trial court.

The court below completely disregards the express statutory percentage tests enacted by Congress in 1949. In its opinion here, the court, using its own pre-1949 concept of "retail" (see *supra*, pp. 15–16), cited *Taylor* and *Boisseau* (*supra*, pp. 12–13, 17–18) as "demonstrating that Congress had added that sentence [the sentence prescribing the "not for resale" and "industry recognition" test] only in an effort to clarify the meaning of the sentence preceding it" (250 F. 2d at 50, fn. 9). The *Boisseau* decision apparently held only that the employer had there sustained his burden of showing "by a preponderance of the whole evidence that his services are 'recognized' as retail in the 'particular industry' with which he is found by the court to be identified" (218 F. 2d at 739); and the express holding of *Taylor* was that "the trial court did not err in basing its findings of fact" with respect to industry recognition solely upon the opinion of industry members. However, in this case the court has cited these decisions to sustain its conclusion, in the absence of any supporting evidence, that, "as a matter of law," respondent "was exempt from the provisions of the Fair Labor Standards Act" (250 F. 2d at 51). We

[7] *Cf. Boisseau* v. *Mitchell*, 218 F. 2d 734, 737 (C.A. 5), where the court recognized that "the courts must now identify the 'industry' of which the business is a part and determine whether the sales or services are considered 'retail' in that industry."

submit that the percentage tests set forth in Sections 13(a)(2) and 13(a)(4) do not merely furnish suggested guides for the judicial interpretation of the phrase "retail or service establishment," but represent necessary conditions precedent to the application of these exemptions.

CONCLUSION

The decision below should be reversed and the judgment of the trial court reinstated.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

HAROLD C. NYSTROM,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
BEATE BLOCH,
Attorneys,
Department of Labor.

SEPTEMBER 1959.

APPENDIX

Pertinent Statutory Provisions

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*, are as follows:

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission or communication among the several States or between any State and any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

* * * * *

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * * * *

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * * or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.

* * * * *

SEC. 16. * * *

(b) [As amended 61 Stat. 87.] Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an ad-

ditional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similary situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

U.S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1959.

John W. Arnold, Petitioner, v. Ben Kanowsky, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 23, 1960.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case concerns the provisions of the Fair Labor Standards Act exempting from wages-and-hours coverage certain retail sales and service establishments.[1] The suit was brought by petitioner individually under § 16 (b) of the Act for payment of overtime wages claimed under § 7. The Court of Appeals for the Fifth Circuit reversed a District Court judgment for petitioner[2] and we granted

[1] 29 U. S. C. § 213 (a), 63 Stat. 91, § 13 (a).

The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed by any retail or service establishment more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry . . . or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes sales or processes at the retail establishment the goods that it sells: Provided, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located.

[2] The decision of the Court of Appeals is reported at 250 F. 2d 147. An opinion on rehearing is reported at 252 F. 2d 787.

certiorari, 359 U. S. 983. The proceedings in this Court are *in forma pauperis*. Both sides submitted on their briefs and oral argument was heard only from the representative of the Secretary of Labor appearing as *amicus curiae*.

Respondent conducts an interior decorating and custom furniture business in Dallas, Texas. On the same premises he fabricates aircraft parts from phenolic, a cloth-impregnated phenol resin. This plastic is widely used in aircraft and automotive parts and can be machined on the woodworking equipment respondent has available in his furniture shop. Petitioner was employed by respondent from October 17, 1954, through September 2, 1955, primarily in the fabrication of phenolic parts.

At the trial, a representative of Chance Vought Aircraft Inc., testified that his company purchased over $34,000 worth of phenolic parts from respondent in 1955 and that these parts were used in aircraft and missiles sold to the United States Navy. A representative of Temco Aircraft Company testified that it purchased about $2,000 worth of phenolic parts annually from Kanowsky for use in manufacturing aircraft subassemblies for the Air Force or for prime contractors, many of whom were located outside the State. Respondent also shipped a small amount of sheet phenolic directly outside the State.

During the year beginning October 1, 1954, respondent's sales totaled $99,117.52, and its sales of phenolic and phenolic parts were $39,751.71, or almost exactly 40% of its total sales. Its secretary-treasurer admitted that phenolic aircraft parts alone accounted for at least 25% of the company's total sales. Respondent introduced no evidence concerning the amount or nature of sales of phenolic in forms other than aircraft parts. Notwith-

standing the admitted percentage of its total sales attributable to phenolic parts, respondent claimed exemption from the provisions of the Fair Labor Standards Act because of the retail character of its business.

The District Court found that petitioner was engaged in the production of goods for commerce within the meaning of the Act, and upon respondent's admission that petitioner had been paid for overtime hours only at straight time rates, entered judgment for petitioner for unpaid overtime compensation plus an attorney's fee. The Court of Appeals reversed on the ground that respondent was exempt from the Act's overtime requirements under § 13 (a)(2) as a "retail or service establishment."

We believe that the Court of Appeals was in error and must be reversed. The wording of the statute, the clear legislative history, and the decisions of this Court require this conclusion.

Petitioner admittedly is engaged in the manufacture of phenolic parts for commerce. That this activity may be considered a "sideline" from respondent's viewpoint does not remove petitioner from coverage under the Fair Labor Standards Act unless the respondent's activities fall within the specific exemptions enumerated in § 13 of the Act. As originally passed in 1938, the Fair Labor Standards Act exempted from coverage "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." In 1949 Congress substituted[1] a three-part definition for this provision. Any employee employed by a retail or service establishment is to be exempt if more than 50% of the establishment's annual dollar volume of

[1] 52 Stat. 1060, 1067.

sales is made within the State, if 75% of its annual sales volume is not for resale, and if 75% of its annual sales volume is recognized within the industry as retail sales.

This Court had occasion at the last Term to point out that the 1949 revision does not represent a general broadening of the exemptions contained in § 13.[4] Rather, Congress "was acting in implementation of a specific and particularized purpose" to replace the unsatisfactory "business use" test, which had developed around the 1938 provision, with a formula that would be at once flexible and at the same time provide clear statutory guidance to the Administrator.[5]

We have held that these exemptions are to be narrowly construed against the employers seeking to assert them, and their application limited to those establishments plainly and unmistakably within their terms and spirit.[6] The three conditions of § 13 (a)(2) are explicit prerequisites to exemption, not merely suggested guidelines for judicial determination of the employer's status.[7]

While § 13 (a)(2) contains the requirements every retail establishment must satisfy to qualify for exemption, a retailer-manufacturer must satisfy the additional

[4] *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 293.

[5] *Id.*, at 293. See also the statement made by Senator Ho[illegible], manager of the amendment, during the debate in the Sen[illegible] Cong. Rec. 12491; and the remarks of Representative [illegible] introduced the amendment in the House, 95 Cong. Rec. 11[illegible].

[6] *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295.

[7] Such cases as *White Motor Co.* v. *Littleton*, 124 F. 2d [illegible] (5th Cir. 1941), relied upon by the Fifth Circuit in its opinion in this case and decided at a time when there was no statutory definition of "retail and service establishments," no longer can have [illegible] in view of the 1949 amendments. The extent to which the *White Motor Co.* decision rests on the absence of a statutory definition of "retail" is shown in 124 F. 2d, at 93.

requirements of § 13 (a)(4) since it "makes or processes" the goods it sells.*

Turning to the facts of this case, it is clear that respondent, through its fabrication of phenolic parts, is "making or processing the goods that it sells." To gain exemption it therefore must comply with the criteria of § 13 (a)(2) as they are incorporated by reference in § 13 (a)(4), as well as the additional requirements of § 13 (a)(4) itself. It is clear that respondent does not meet at least two of the three standards of § 13 (a)(2) as included in § 13 (a)(4).

First, the fabrication of phenolic parts accounts for more than 25% of the respondent's annual sales volume. The court below assumed that respondent's sales were

---

*Prior to the 1949 amendments to the Act, the whole area of manufacturing was excluded from the retail exemption. It had been repeatedly held that establishments engaged to any extent in manufacturing or processing activities could not qualify for exemption under former § 13 (a)(2). *E. g., Grant* v. *Bergdorf & Goodman Co.*, 172 F. 2d 109 (C. A. 2d Cir. 1949); *Fred Wolferman, Inc.*, v. *Gustafson*, 169 F. 2d 759 (C. A. 8th Cir. 1948); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (C. A. 7th Cir. 1945); *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. A. 3d Cir. 1943); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. A. 4th Cir. 1943); *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79 (C. A. 5th Cir. 1942); see *Roland Electric Co.* v. *Walling*, 326 U. S. 657, 666-678. The Administrator's interpretation comporting with this view is to be found in Interp. Bull. No. 6, as revised and reissued June 16, 1941, 1942 WH Manual 326.

The legislative history of the amendments, as reflected by statements of the sponsors and Committee Reports, clearly evidences that § 13 (a)(2) as amended "does not apply to any manufacturing activities since such activities, when conducted by a retail establishment, if exempt, are intended to be exempt under § 13 (a)(4)." Statement of the House Conferees, 95 Cong. Rec. 14932; see also the statements on the floor of Congress by the managers for the amendment in each House, Senator Holland and Representatives Lesinski and Lucas, 95 Cong. Rec. 12495, 14942, 11216.

recognized in the community as retail sales without any evidence to support the fact. This conclusion was not justified, since it is clear that Congress intended that "any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 per-cent of his sales are recognized in his industry as retail."

Second, the Court of Appeals assumed that the sales of phenolic and phenolic parts were not for resale and in doing so, it was in error. The sales of parts to one company alone for incorporation in airplanes and missiles that were to be sold to the United States Navy exceeded 25% of the total. These sales indisputably were made with the expectation that the parts would be incorporated in aircraft and that the aircraft would be sold. Such transactions are clearly within the concept of resale.[9]

Since respondent has not sustained its burden of proving that 75% of its annual sales volume is not for resale and is recognized as being retail in the particular industry, we need not reach the question whether the additional standards of § 13 (a)(4) itself are met.[10]

---

[9] Remarks of Senator Holland, 95 Cong. Rec. 12502; see also Representative Lucas, 95 Cong. Rec. 11004, 11116; see also statement of the majority of the Senate Conferees, 95 Cong. Rec. 14877.

[10] See statement of the House Conferees, 95 Cong. Rec. [illegible]; statement of majority of Senate Conferees, 95 Cong. Rec. 14877; 29 CFR § 779.15 (c) (Supp. 1959); cf. *Mitchell* v. *Shreveport* [illegible], 264 F. 2d 831, 834 (C. A. 4th Cir. 1959). As the [illegible] materials indicate, the exemption from the general [illegible] for residence and farm construction repair and maintenance, § 3 (n), 29 U. S. C. § 203 (n), evinces an intent to classify [illegible] for use in articles to be sold as "resale."

[11] The employee having shown that the nature of his [illegible] brings him within the coverage of the Act, the nature of [illegible] lishment" in which he is employed will be drawn into [illegible] if the employer seeks an exemption under § 13, in which [illegible] burden of proving the nature of the establishment is on the [illegible]

We hold that respondent has not satisfied the requirements of § 13 and is not entitled to exemption thereunder. The judgment of the Court of Appeals is reversed; the judgment of the District Court is reinstated, and the cause is remanded to that court for consideration of the prayer of petitioner for further counsel fees in accordance with the provision of the Act.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1959.

John W. Arnold, Petitioner, v. Ben Kanowsky, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 23, 1960.]

Mr. Justice Whittaker, dissenting.

Section 13 (a) of the Fair Labor Standards Act exempts from the wage and hour provisions of that Act employees of "any retail or service establishment," as there defined. See note 1 of the Court's opinion.* Therefore, the entity to be considered is the "establishment." A single employer may conduct two (or more) "establishments," side by side or even under the same roof, one of which could be a "retail or service establishment," as defined in and exempted by § 13 (a), and the other not. Here, respondent appears to have been separately engaged in three activities: (1) the manufacture and sale of phenolic, in which enterprise several persons—the number is not stated in the record—were employed, (2) an interior decorating business, commonly employing five persons, and (3) the custom manufacture and sale of furniture, employing a small, but varying, number of employees. During petitioner's employment by respondent—from October 17, 1954, through September 2, 1955—he worked for a period in one of these enterprises and then in another, but, as the Court says, he worked primarily in the fabrication of phenolic parts.* Upon respondent's admis-

*The witness Kanowsky testified:

Q. To your knowledge, were there a number of weeks that he didn't do any work on phenolic aircraft parts at all?

[Footnote continued on p. 2]

sion at the trial, that petitioner had been paid for overtime hours worked "only at straight time rates," the District Court, without any evidence showing the number of hours worked in the one as distinguished from the other of these enterprises, entered judgment for petitioner for overtime compensation for *all* overtime hours worked by petitioner, and an attorney's fee.

Although, as the Court correctly says, respondent in its phenolic enterprise, was engaged in the production of goods for commerce and a major part of that production was sold for resale and, hence, that enterprise was not a "retail or service establishment," as defined in § 13 (a) it appears that all of respondent's interior decorating services were rendered locally; and that all of the custom furniture manufacturing was done and the furniture sold locally and not for resale. And, therefore, it would appear—at least there is room for a finding that respondent's interior decorating and custom furniture manufacturing and selling enterprises were "retail or service establishments," as defined in § 13 (a). But, there is no finding by the District Court that these three enterprises were conducted by respondent in three "establishments" or in only one "establishment"; nor is there any finding as to what percentage of the interior decorating

A There had to be, yes, sir.

Q To your knowledge, were there a number of weeks when he did seventy-five percent or more of his work on furniture things of that nature?

A Yes, sir.

The witness Justice, employed primarily in the interior decorating establishment, testified:

Q How about when they were doing this interior decorating job down town?

A I believe he worked down town practically all the time.

Q Were there weeks at a time that you know of that seventy-five percent of his work was done on furniture and stuff like that and the balance on phenolics?

A Yes, sir.

services were rendered locally, or what percentage of the custom furniture manufacturing and selling was done locally and not for resale.

Only if respondent's three enterprises constituted one "establishment" would there be support in the record for the judgment, and, as stated, there is no finding to that effect. The only oral argument made here was by counsel for the Department of Labor, as *amicus curiae*. Its position is that, as a matter of law, respondent operated no more than two "establishments"; that the phenolic enterprise might be one "establishment," and it clearly was not a "retail or service establishment" as defined in § 13 (a) (I agree that this is so); that the interior decorating and custom furniture manufacturing and sales enterprises might be another "establishment"—why these two enterprises might not be two "establishments" was not explicated. Its counsel then argues that, because some custom manufacturing of furniture was done in the latter "establishment," it could not, as a matter of law, be a "retail or service establishment" as defined in § 13 (a). That argument would have had some force prior to the 1949 amendment to § 13 (a) (63 Stat. 917), but it is in the teeth of that amendment, as clause 4 of the section, as then amended, provides that the wage and hour provisions (§§ 6 and 7) of the Act do not apply with respect to a "retail or service establishment" as defined "*notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. . . .*" (Emphasis added.) In the absence, as here, of essential evidence (showing the overtime hours worked in each of the several "establishments" if more than one) and findings, I think the record does not support the judgment nor disclose the matters requisite to a decision of the question sought to be presented. I would, therefore, dismiss the writ as improvidently granted, or, at the very least, remand the case to the District Court for a new trial and for proper findings of fact on the determinative issues.